New INDIVIDUALIST Review

THE REGULATORY BUREAUS:

ICC: SOME REMINISCENCES ON THE FUTURE OF AMERICAN TRANSPORTATION

CHRISTOPHER D. STONE

CAB: FREEDOM FROM COMPETITION

SAM PELTZMAN

FCC: FREE SPEECH, "PUBLIC NEEDS," AND MR. MINOW

ROBERT M. HURT

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CZECHO-SLOVAKIA AND THE USSR

OTTO VON HABSBURG

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NEW INDIVIDUALIST REVIEW

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The Regulatory Bureaus:

ICC: Some Reminiscences on the Future of American Transportation
3 CHRISTOPHER D. STONE

CAB: Freedom from Competition
16 SAM PELTZMAN

FCC: Free Speech, "Public Needs," and Mr. Minow
24 ROBERT M. HURT

Czecho-Slovakia and the USSR
38 OTTO VON HABSBURG

The Case Against Coercion
44 ROBERT CUNNINGHAM

Ireland, Victim of Its Own Politicians
48 JOHN P. McCARTHY

New Books and Articles
55

Due to unavoidable technical difficulties, we have been forced to omit the Winter, 1962 issue of *New Individualist Review*. The present Spring, 1963 issue follows the Autumn, 1962 issue as Volume 2, Number 4. Subscriptions will not be affected by this omission; each subscriber will receive four issues for a one-year subscription.

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IN MEMORIAM

Richard M. Weaver

Few men have been as important in the intellectual renaissance of American conservatism as Richard M. Weaver. His first book, Ideas Have Consequences, has been regarded as one of the starting-points of that renaissance, and its influence has continued to grow in the fifteen years since it was published. He wrote the lead article in the first issue of Modern Age, and he was an associate editor of that magazine. He taught English for twenty years at the University of Chicago, where his teaching ability and his stress on the importance of language, his "respect for words as things," earned him in turn the respect of his students and his colleagues.

He was also one of our editorial advisors, and we shall miss him very much. He was always willing to help us in any way that he could, and he was ready to advise us when asked, but he believed firmly in editorial freedom, and he never sought to press his views upon us. His patience and good humor were invaluable in sustaining this magazine and reassuring us when difficulties arose.

A few weeks before his death, Professor Weaver spent an evening with our staff and several other students. He talked about the book he was writing and the three or four more that he planned to write, but he was more interested in the future of conservatism, particularly its intellectual future. He looked forward to that future, and he was confident that it would be exciting, and that eventually conservatism would again prevail. If it does so, much of the credit will belong to him.

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THE REGULATORY BUREAUS:

ICC: Some Reminiscences on the Future of American Transportation

CHRISTOPHER D. STONE

The Commission . . . can be made of great use to the railroads. It satisfies the popular clamor for a government supervision of the railroads, at the same time that the supervision is almost entirely nominal. Further, the older such a commission gets to be, the more it will be found to take the business and railroad view of things. It thus becomes a sort of barrier between the railroad corporations and the people and a sort of protection against crude legislation hostile to railroad interests. . . . The part of wisdom is not to destroy the Commission, but to utilize it.

—*Letter of Attorney General of the United States Richard Olney to Charles E. Perkins, President of the Chicago, Burlington and Quincy Railroad, Dec.* 28, 1892.[1]

DISSATISFACTION WITH the Interstate Commerce Act and its administrator, the Interstate Commerce Commission, has inspired a great number of proposals, currently before the Congress, to revise the transportation regulatory scheme. An understanding of problems which presently beset the transportation industry may be somewhat advanced (they will certainly not be solved) by a few observations on the state of affairs which brought Congress to the juncture of federal regulation, and upon the evolution of the Interstate Commerce Commission as an agency to do the job which Congress wanted done.

By the time the Second Session of the Forty-ninth Congress convened, on December 6, 1886, it had become fairly certain that some sort of railroad regulatory body was going to emerge. Only six weeks before, the Supreme Court's decision in *Wabash, St. Louis and Pacific Ry. Co. v. Illinois*[2] had voided practically all state regulation in this field upon the grounds that the Constitution vested in the federal government alone the power to legislate upon interstate railroad transportation. The unexpected Wabash decision had thus left the nation without so much as a shell of governmental regulation to point to as an excuse for continued debate.[3] In Washington and with-

Christopher D. Stone received an A.B. from Harvard College and an L.L.B. from the Yale Law School. He has been the author of several articles appearing in law reviews and is at present the Law and Economics Fellow at the University of Chicago Law School.

[1] Quoted in Josephson, *The Politicos* (New York: Harcourt, Brace, 1938), p. 526.

[2] 118 *U.S.* 557 (1886).

[3] In deed, if not in word, the Wabash decision was a reversal of a series of 1876 decisions popularly known as the Granger cases. See Munn v. Illinois, 94 *U.S.* 113.

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out, for some years previous, both railroad and anti-railroad interests had been lobbying intimately with Congress; and the imminence now of the first of the federal government's modern regulatory agencies, so long in gestation, brought both sides to an uneasy bed-watch—for even at this late date, it was uncertain whose child it would prove to be.

Although the coming federal regulatory board, whatever powers might shortly be conferred upon it, symbolized a cross-roads in the relations of government to industry, it would be wrong to suppose that prior to 1886 the federal government had steadfastly refused to intercede in the conduct of the nation's business affairs. The transportation industry, perhaps more than any other, had been fostered from the start by a series of measures which lay beyond the pale of *laissez-faire*. The very first tariff act (1789) set a precedent for lower duties to be charged on goods entering the United States in American bottoms. The Embargo Act of 1808 had presented the American shipping industry with a ban on foreign ships in the U.S. coastal trade; and by 1830, Congress had instituted the practice of doling out public funds to ship owners—in the form of handsome mail subsidies—thereby paving the way for the sensational investigations of Senators Gerald Nye and Hugo Black, one century later. State finance of early turnpikes made the business of transportation by wagon feasible on a theretofore unrealizable scale. Public reaction was satisfactory enough "to inaugurate a strong movement in favor of a national system of roads constructed with the aid of the federal government,"[4] although the only upshot, to this time, had been partial construction of the Cumberland Road — the "National Pike" — projected from Washington to the Mississippi. The success of the State of New York's Erie Canal (1808-1825) set off a flurry of publicly financed canal construction, thus drawing the expenses from society in general, rather than from the waterway operators and industrialists who stood most directly in the line of benefit.

But of all the bountiful intrusions upon the sanctity of free enterprise, that which had been accorded the railroads loomed the largest.

Initially (1830-50) the government's policy toward the railroads had been moderately *laissez-faire*. It may be assumed that early railroad development roughly paralleled, through time, the probable returns on railroading investment relative to returns elsewhere in the young economy—and thus relative to the economies of, and demand for, transportation by competing modes of carriage.

But at least by the year 1850, agitation for a less modest expansion of the rails had reached a high pitch in the Congress, and it was proposed that the federal government cede to the states vast tracts of public domain to be applied as land grants for otherwise reticent railroad entrepreneurs. Senator Davis of Georgia commented sourly that "the Government seems to me to be becoming a great eleemosynary institution,"[5] while in the House, North Carolina's Representative Venable warned of "Wall Street speculators," and predicted that, "The House were [sic] asked today to tie together ... the various sections in a system of log rolling and corruption which would absorb the entire public domain."[6]

The government proceeded to offer up an estimated 242,000 square miles of public domain—an area greater by one-fifth than the territory of France—as a lure to further the construction of rails. Seven Western states were to give up from a fifth to a quarter of their birthrights. Gifts and loans by the federal, state, and local governments totalled an additional 700,000,000 nineteenth century dollars. According to one commentator, "The Lone Star state discovered in 1882 that in her youthful ardour she had given away some 8,000,000 acres more than she possessed."[7]

The campaign of construction had immediate and dramatic effects. In the decade from 1850 through 1859 over 20,000

[4] S. Rep. 46, Part 1, 49th Cong. 1st Sess. (1886) p. 5.

[5] *Congressional Globe*, 31st Cong. 2nd Sess. (1851) p. 322.

[6] *Congressional Globe*, 31st Cong. 1st Sess. (1850) p. 1887.

[7] Sharfman, *The American Railroad Problem* (New York: Century, 1921), pp. 34-5.

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miles of rail were built, nearly three times that which had been built in the twenty years preceding. The Civil War slowed construction markedly; but the peace was followed by unprecedented railroading vigor. 1869 saw completion of the Union Pacific-Central Pacific link from the Missouri River (Omaha) to the Pacific (Sacramento). In 1871, a cobweb of rails having been spun in and between the East and Midwest, and a second, third, and fourth transcontinental line having threaded their ways to the Pacific, the land grant program was brought to an end. The country was by this time on the verge of a financial panic and depression sponsored by the "construction mania" itself (1873-78).

Neither the conclusion of the land grant program, however, nor the panic of the seventies, halted economically questionable ventures and the trend towards overcapacity. For though the *operation* of railroads had proven profitable enough as a legitimate pastime, the truly memorable fortunes were being lavished upon those who promoted new construction with absurdly watered stock, or speculated in any number of the ingenious ways by which railroads were born for purposes of swindle, and not soberly predicated upon the expectation of a sustaining demand. But whatever the sum of the causes, by 1886 the nation looked back to see that with the planting of the roots of a great industrial power, the previous three decades had witnessed a helter-skelter dedication to the establishment of railroad capacity far out of proportion to the foreseeable demands of traffic. In 1886, the country found itself saddled with 7¼ billion dollars invested in railroads and railroad equipment, representing more than one half that year's gross national product,[8] one-fifth the entire wealth of the nation.[9] Track was still being laid so fast that by 1890 perhaps 80% of today's road mileage would be accounted for.[10]

Once virtual monopolists wherever they chose to build, the railroads were feeling the press of competition. Marginal roads had begun to fail. Even though it was in the interests of the railroads as a group to keep rates high, each individual competitor found himself with significant excesses of rail and rolling stock on hand, which made it tempting to succumb to any rate offer which would utilize capacity, cover direct costs, and make some contribution to overhead. To "stabilize" rates, railroads operating along competing routes made arrangements to divide earnings equally among themselves; such collusive "pooling" (not then illegal) partly obviated the mutually disadvantageous incentive to compete for shippers' favors. But even where pools existed, they were fraught with suspicions, and railroad managers who wanted to retain prize accounts took to effecting rate reductions through secret rebates—secret from other shippers, who would, if they knew of them, insist upon equal treatment, and secret from other railroads, who would, when they found out, set off a new round of price cutting. The elaborate network of rebates, preferences and suspicions which evolved was, of course, not only inimical to the railroads, but to the majority of the business community as well. Small and average sized businesses saw the hand of their most powerful competitors strengthened, while rational marketing decisions were frustrated by the impossibility of ascertaining the transportation costs which faced one's rivals.

Pooling, which forestalled but never halted competition's whittling away at the level of rates, and personal preferences, were but two of the plaints which were agitating the nation towards an inevitable rail reform. Because of the manner in which the duplicated and un-

[8] U.S. Bureau of the Census, *Historical Statistics of the United States* (Washington, D.C., 1960), pp. 428, 139. *Transport Statistics in the United States for Year Ended December 31, 1961* (Washington, D.C.: ICC, 1962) Part 1 lists "investment in railroad property used in transportation services" today at $35,132,559,881. p. 114, l. 91.

[9] S. Rep. 46, Part 1, 49th Con. 1st Sess. (1886) p. 49.

[10] *Transport Statistics in the United States, supra* n. 8, lists "miles of road owned" as of December 31, 1961, at 187,782 (p. 120, l. 207). *Historical Statistics of the United States, supra*, n. 8, lists road owned in 1890 at 163,359 miles (p. 427). The respective figures for all track (including second main track, yard switching tracks, etc.) are 300,551 at present, 208,152 for 1890.

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derutilized rail facilities had spread themselves across the country, certain locations afforded shippers who located there a number of competitive alternatives for the transportation of their wares; whereas other communities were, as a practical matter, wholly dependent upon a single carrier. In cities which were becoming the great hub-like rail centers (as in cities along the waterways and upon the seas), businessmen could play off one railroad manager against another, or against barge and ship owner. Rates not only fell in such centers, but the effect was self-perpetuating. The lower rates in the favored locales held out to new industry the promise of cheap access to raw materials and strategic flexibility in seeking out markets; and the influx of new industry brought still more carriers to their doorsteps. As a result, the industrial map of the nation was being etched in such manner that the fortunes of some centers of commerce were guaranteed—while vast areas were foredoomed to the less rewarding and more menial tasks which running a country call for.[11] Inhabitants of the less favored areas viewed this trend with especial indignation since they imagined the high rates they had to pay as in some sense defraying or offsetting those of the favored regions.

THE IMPOTENCE of state legislation to quell discontent had been tempting federal intercession at least as early as 1872, but no concrete legislation had resulted. In March, 1885, the Senate authorized a five man Select Committee on Interstate Commerce (the Collum Committee) "to investigate and report upon the subject of the regulation of transportation."[12]

The Collum Committee enjoyed a full presentation of the basic issues which to this day divide the bulk of the public from the bulk of the transportation industry. The "public" rallied around the standard saw of the economics primers, that the evil effects of monopoly (of which collusion is a struggling imitator) are high prices, low output, and, more broadly, a misallocation of resources. From the same fundamental observation on competition and monopoly derives the early railroad executive's probably unwitting epigram: "the evil effects of competition upon net earnings."[13] Each side wished to resist the onslaught of its own particular evil.

One of the public's grievances with pooling was, of course, that truly competitive bidding would have given it the benefit of lower rates. On the other hand, the implications of collusion for the transportation dilemma, then and now, go beyond the price of carriage and can only be understood in relation to the misallocation of resources which it was destined to effect. From this point of view, to the extent that collusion succeeded in holding prices up, it prohibited the transportation of certain marginal commodities which might otherwise have been able to enter into commerce; and so restricted the growth of all firms which produced, distributed or utilized them. Further, by interfering with the free market mechanism, price "stabilizing" abetted the overinvestment in railroad capacity which land grants, fiscal subsidies, and speculation by promoters had begun. For to the extent that collusion successfully "stabilized" prices, investment returns from railroading were reduced not by a decline in the level of prices which the public had to bear, but

[11] In the 1870's, a Rochester manufacturer shipped his goods destined for Cincinnati first *eastward* to New York, and from there back westward to Cincinnati via Rochester again, because by such a roundabout passage he was able to save himself 14¢ a hundred pounds; but the effect more than forfeited the natural advantage he might have enjoyed in competing with the easternmost manufacturers for the Ohio market. Complaints of this nature were widespread. And if some discriminatory rates might be ascribed to alternative means of carriage, and the dictates of competition, in the background of still other inequities there seemed to lurk merely an unarticulated scheme to perpetuate certain centers of commerce at the expense of others. Thus, the rate on gloves from San Francisco to Denver was $2.00 per hundred pounds, but if someone were imprudent enough to establish a glove factory in Denver, the rate for him to San Francisco would be $3.00. Jones, *Principles of Railway Transportation* (New York: Macmillan, 1924), p. 106.

[12] The "Collum Report" is S. Rep. 46, Parts 1 (report proper) and 2 (testimony), 49th Cong. 1st Sess. (1886).

[13] Haines, *Restrictive Railway Legislation* (New York: Macmillan, 1906), p. 233.

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solely by a further division of traffic among the "in" roads and each successive newcomer, whose very reason to enter the industry was the attractiveness of uncompetitively high rates. The result was to decrease the utilization of capacity between given points; where three roads could economically have carried the freight, five sprang up, each lamely operating at 3/5 capacity or less. There was that much less steel for the rest of the economy, that much less land, entrepreneurial skill and mobile capital.

The railroads' answer to the problem of overcapacity was federal intervention, too—but not the outlawing of pooling. The existing railroads were perfectly willing, as Colonel Fink, their commissar of pooling proposed, to submit to legislation barring the threat of new competitors.[14] As for collusive rate making, moreover, here, too, federal power could be brought to the railroads' own advantage: to prevent the debilitation of pooling they asked that "Congress should legalize pooling, and impose a heavy penalty for any violations of the pooling agreement."[15]

This was, no less than the request for the government imposed strictures upon entry, tantamount to a hope that, as the railroads' own efforts at cartelization were faltering, the sanctions of federal power should come to the rescue of Colonel Fink. In addition, only the federal government (if anyone) could effectively cope with the Achilles heel of collusion: secret rebates, with their ineluctable tendency to reduce rates to a competitive level. Chairman Collum asked the eminent Charles Francis Adams (then president of the mighty Union Pacific), "Suppose Congress were to pass a law, not interfering with pooling, but prohibiting the payment of drawbacks and rebates . . .?" Adams' answer is instructive.

> It would be the greatest boon you could confer, because that would do away with the lack of confidence of which I just now spoke. If you could provide any way by which all passenger and freight agents could be absolutely debarred from making reductions from published rates, and from deceiving each other while doing it, *you would be very much more successful than I have been in my limited sphere.*[16]

Indeed, even if price changes were freely allowed, there was good reason to believe that price competition could be discouraged if only the federal government would enforce a requirement that *intentions* of rate changes be prepublished.[17]

These requests for government assistance to stabilize the railroads' faltering cartel sought a common justification: the glut of rail capacity, which all were prepared to concede. But was there such overcapacity that, but for the right to collude, something called "destructive competition" would have "destroyed" the railroads? The railroads tried to create this impression before the Collum Committee, but whatever the proposition may mean precisely, it seems unconvincing as a basis for legislative action. The literal *survival* of existing facilities (as opposed to their rusting away) would depend upon the railroads' abilities to cover fixed

[14] S. Rep. 46, Part 2, 49th Cong. 1st Sess. (1886) pp. 117-18.

[15] S. Rep. 46, Part 2, 49th Cong. 1st Sess. (1886) p. 1205 (testimony of Charles Francis Adams) and p. 117 (testimony of Albert Fink). Up to this date pooling had not been made *illegal* (as the anti-rail elements were now proposing) in the sense that parties to a pooling agreement could not be criminally prosecuted. On the other hand, under the common law, pooling arrangements were *unenforceable* as contractual obligations. Thus, if the parties to such an agreement were "wronged" by one of their number, they could have no redress in the courts. The result must have been to encourage independent price setting when it seemed more promising than commitment to the pool.

[16] *Ibid.*, p. 1210.

[17] For one thing, the rationale for an oligopolist to cut prices to select shippers is the short run profits he can make from added volume *until the others find out;* then they will have to lower their prices, too, and when the rates have resettled, the temporary advantage of the maverick has been lost and road rates are lower all around. A government enforced thirty day public notice of rate reduction would stand competitor roads on guard, so that not even short run profits could be anticipated by the price cutter. Besides, he would, in effect, be standing up and confessing a sin which might bring reprisals. And thirdly, the reduction would have to apply to a general class of goods: well calculated selective price cuts would be hampered. cf. P. W. MacAvoy, "Trunk Line Railroad Cartels and the Interstate Commerce Commission (1870-1900)," p. 28 (unpublished, Univ. of Chicago).

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and variable costs from year to year and this was no widespread problem. Certainly, if demand did not pick up in the coming years faster than competition reduced earnings, some roads would not be able to replenish obsolescent stock and a few roads, undoubtedly, would sell out to other roads at a price reflecting their nuisance value, or go bankrupt and be operated by creditors. But if such were the mandate of the free market, was there any reason to resist it? Is this not the sense in which all competition is by its very nature "destructive"?

IN 1963, IT IS to a large extent true that all the various pleas the railroads made in 1885-87, for Congress to cartelize the transportation industry, have since wended their way into law. But the same shoe, today, must also fit truckers, waterway operators, intercoastal shippers, freight forwarders, and pipeline companies, as a result of which the railroads are feeling the pinch.

Government cartelization did not spring into being with the Interstate Commerce Act of 1887. This first legislation emerged on sort of a middle ground and, partly through judicial evisceration, was not terribly significant in any direction, except to establish the principle of federal surveillance. The original Act applied to carriage wholly by railroad, and partly by railroad, partly by water, where both were under joint control. Pooling was prohibited (rate bureaus, mergers, and joint banking control took its place). The Act declared that all rates must be "just and reasonable" (but the Supreme Court soon pointed out that there was no actual power to amend "unjust, unreasonable" rates). Personal and geographic preferences were prohibited in word (but the Commission turned out to have no power to prescribe non-discriminatory rates). Carriers could not charge more for a short haul than a long haul (the New York, Rochester, Cincinnati problem, n. 11 *supra*) but the provision contained a loophole which made it little more than a sentiment. Within ten years of its establishment, it might have appeared that the federal commission was destined to be as powerless as its state predecessors.

> *"The part of wisdom is not to destroy the Commission, but to utilize it."*[18]

Utilize it the railroads did, and soon. In 1903, the Elkins Act amended the Interstate Commerce Act to close up the loopholes in the anti-rebate provision they had sought. Any deviation from published tariffs (except the most ingeniously contrived) were unlawful. The rail lobby soon organized "the most reckless publicity campaign . . . ever known in the history of railroad control"[19] to combat Teddy Roosevelt's attempts to bring them under effective control. The Hepburn Act of 1906 (which significantly extended the breadth of activities over which the Commission had jurisdiction) gave the rails the provision they had been seeking for thirty days notice in advance of rate changes. Departures from published tariffs now could be punished by imprisonment—for both those giving and those receiving rebates—a move which was another step toward the "stabilization" of rates. The railroads were no longer "allowed" to give free passes, a freedom they had always preferred to be without.

Nonetheless, the most far reaching innovation of the Hepburn Act, vesting the Commission with the power to review maximum rates, might have been detrimental to the railroads, should they have been unable to secure the appointment of commissioners sympathetic to the problems of owning railroad stock. As it turned out, the early attitude of the Commission (certainly until 1918) was such that it granted only a minor fraction of railroad demands. But by the time the railroads had struck back with passage of the Transportation Act of 1920, directing the ICC to maintain rates which would yield a "fair return" (a provision since repealed as unworkable) the sentiment on the Commission had turned congenial enough to grant boosts of 25% to 40%, in some cases more than the railroads them-

[18] *Supra*, n. 1.

[19] Dixon, *Railroads and Government* (New York: C. Scribner's Sons, 1922), p. 3.

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selves had deigned to ask.[20] In fact, the Commission had proved itself so overindulgent that rates had to beat a partial (10%) retreat within two years when traffic balked.

Still, the Commission's attitude towards maximum rate "control" was such that from 1924 through 1929, freight rates were stabilized at about 165% of the 1913 level, whereas wholesale prices had fallen back to 140% of that same standard. During the depression, with the wholesale price index down 30% from the 1929 level, the Commission's contribution to the emergency was to continue to grant price increases anyway. In fact, the Commission has not denied *in toto* a railroad request for a general price increase since 1926.[21] Today, authorized carload rates may be as much as 25% *more,* on the average, than the railroads are finding it profitable, in their discretion, to levy.[22] Indeed, the railroads' major pricing concern today has shifted to seeking *lower* rates, and the Commission's power over maximum rates is becoming more and more superfluous.

The year 1920 saw enactment of Colonel Fink's request that strictures be placed in the path of prospective competitors who seek to enter the business of railroading. The device was the Certificate of Public Convenience and Necessity which, henceforth, would have to be issued before further railroad line capacity could be constructed. Another proviso gave the Commission power to legitimize pooling agreements once more, if the Commission, in its enlightened omniscience, found such collusion "in the interest of better service to the public." In a similar about-face of policy, the Congress relieved from the operation of the antitrust laws ICC approved mergers and acquisitions of control over a competing road through lease or stock ownership.

The Transportation Act of 1920 had not only resulted in a sudden upswing of rail rates, but the 1920 Act broke ground for a cartelization device even the industry spokesmen of the 1880's had not deigned to suggest: the Esch-Cummins Bill gave the Commission *power to set federally enforceable minimum rates.* Perhaps to this, as well as to the extravagantly high maximum rates which the Commission decreed in the same year, can be ascribed the fact that between 1920 and 1924, truck registration in the United States nearly doubled.[23] Thus, the artificially high rate structure had a backlash to it, much as it had had in the nineteenth century; but now, with the entry-stalling certificates of public convenience and necessity having closed the doors on rail expansion as an equalizer of investment possibilities, trucks were driving through the windows.

The railroad industry first tried to meet truck competition by advising friends in state legislatures as to the evils of trucks on highways, suggesting a variety of enactments such as would prescribe maximum truck speeds, maximum gross tonnage, and upper limits to truck drivers' working hours, all of which inured to the respective "safeties" of public and railroad.

But when these and other devices failed, and trucks had asserted themselves as here-to-stay, the railroads took the more enlightened path. The truck industry was so fragmented that truckers couldn't hold their rates up to non-competitive levels *inter se,* much less as against the railroads. As a result, both were threatened with competitive pricing. For that reason, the railroads felt that if only the trucks were cartelized, too, the both of them could fight it out with a little more imagination for the interests they shared mutually against the shipping public. By securing passage of the Motor Carrier Act of 1935, the railroads gave the trucks (and indirectly themselves) some of the benefits they had been enjoying: the ICC was to limit entry through certificates of public convenience and necessity, and rates were to be published and adhered to. The Director of the Commission's new Bureau of Motor Carriers even went on the road to give the truckers fatherly lectures on the elementary economics of collusion.

[20] Jones, *op. cit.,* p. 568.

[21] Huntington, "The Marasmus of the I.C.C.," 61 *Yale L. J.* 467, 482 (1952).

[22] Hearings before the Committee on Commerce, United States Senate, on S. 3242 and S. 3243, 87th Cong. 2nd Sess. (1962) p. 345 and chart, p. 359.

[23] *Historical Statistics of the United States,* p. 462.

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> The Commission wants to work with the industry and wants to work with you operators . . . but we can't work with the industry if there are 57 varieties of rates in the industry. The result of that is going to be that if you folks don't get together yourselves in the interest of uniformity of rates, you may get by with it initially but a little later the Commission is going to have to prescribe them for you.[24]

The Commission not only encouraged unlawful "rate conferences" as between the truckers themselves, but as between truckers and railroaders jointly.[25] Nonadherents to the "rate bureau's" determination might find their low rates cancelled on the grounds that "competitive rate making . . . has resulted in unduly low, depressed, and non-compensatory rates and charges, and instability and unsound economic conditions. . . ."[26]

Because of the large number of truckers (even despite the certificate requirement) the ICC's attempts at giving the transportation industry "stability" were less than perfect, and railroad attempts to help out went so far as undertaking (through the medium of Kuhn, Loeb & Co., the railroad bankers) two efforts to consolidate the truckers into a more happily manageable whole.[27] Though these efforts were blocked, the Association of American Railroads had been able to announce that the American Trucking Assn., Inc. ". . . has shown a disposition to work constructively with the railroads. . . . In many instances the trucking association has insisted on getting low rates that were bothersome to the rail carriers brought to the rail level."[28]

One problem with cartelization is, though those within the cartel can work to mutual advantage, anyone outside the cartel gets a "free ride" in the sense of having a rate umbrella: he can charge as high as the cartel does if it suits his purposes, but if cutting into the cartelists' volume with lower prices is more profitable, he can do that, too. This threatens injury to the cartel. After 1935, the railroads and truckers (and the pipelines, brought under the ICC in 1906) turned about to see the water carriers in just such a position. In 1940, though there was no public clamor for regulation of the water carriers (and a lot against it) the "industry" brought the watermen "in" to the federal regulatory scheme with a righteous and Orwellian doublethought on the old saw about competition and survival: "If one or more forms of transportation cannot survive under *equality of regulation* [!], they are not entitled to survive."[29] Thus: rate "stability" for existent barge and ship owners; limits on competition between them, the rails, and truckers; and certificates of public convenience and necessity for prospective competitors. Predictably, freight forwarders were tapped for ICC membership two years later.

HAVING SO MANY modes of transportation entrusted to its protection was destined to put a strain upon the ingenuity of the ICC, even granted a staff which, by 1962, had passed 2000 employees, and a budget which, for the same year, was pre-estimated at $22,000,000.[30] Not the least perplexing problem was, of course, how to allocate rates (and, hence, traffic) between the various modes. The dedication to competition which appears elsewhere in the economy —even to the point of banishing electrical industry executives to prison—has never commended itself to the commissars of transport. But what better way to proceed?

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[24] *Transport Topics*, Dec. 2, 1935, quoted in Wiprud, *Justice in Transportation* (Chicago: Ziff-Davis, 1945), p. 97.

[25] Rates between Arizona, California, New Mexico and Texas, 3 M.C.C. 505, 511 (1937), quoted in Wiprud, *op. cit.*, pp. 97-98. The unlawfulness is ex *post facto* implied, if it was not always obvious, by Georgia v. Pennsylvania R.R., 324 *U.S.* 439 (1945) and the subsequent Reed-Bulwinkle Act, exempting railroad rate bureaus from the anti-trust laws. (Public Law 662, 80th Cong.)

[26] Ex Parte No. MC-21, Central Territory Motor Carrier Rates, 8 M.C.C. 233, 257 (1938).

[27] Wiprud, op. *cit.*, pp. 33-34.

[28] Hearings before Senate Interstate Commerce Committee on S. 942, Regulation of Rate Bureaus, 78th Cong. 1st Sess. (1943) p. 747.

[29] S. Rep. 433, Part 1, 76th Cong. 1st Sess. (1939) pp. 2-3.

[30] *Interstate Commerce Commission Activities, 1937-62* (Washington, D.C.: I.C.C., 1962), pp. 18-19.

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In regards to adjusting rates between railroads, motor carriers, water carriers and freight forwarders, Congress' mandate to the ICC, via the Interstate Commerce Act, was cliche ridden and inscrutable.[31] The Commission decided that what it was supposed to do was to keep all of its brood in business. In a typical case, the railroads' traffic of bulk petroleum had been nearly cut in half by truck competition, and in an effort to regain it, the railroads reduced their rates below those of the truckers. The trucks said that *their* costs prohibited any further reduction in highway rates. As a result, the Commission cancelled the railroad reduction on the theory that rates must be "so related that they will not be unreasonable, unfair, or destructive . . . and [must] preserve the *inherent advantages* of both."[32] How was the "inherent advantage" to be proven, other than in the ability and willingness of the railroads to carry the petroleum for less? In other cases, the Commission saw its task to be the exercise of minimum rate power whenever it became necessary "to prevent destructive competition and to stabilize the rates at a level which will permit each mode of transportation to participate in the traffic in a just and reasonable manner."[33] It is tempting to imagine what would have happened had the ICC been created at the time of the nation's birth, and exercised continuing jurisdiction over the stage coach: would the government have interceded to keep every competitor's rates above those of Wells, Fargo & Co., to enable that mode to continue participation in the traffic in what the ICC divined to be "a just and reasonable manner"?

Railroad discontent with the Commission's minimum price policy led to a 1958 amendment which directed that "rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation. . . ." But there was enough resistance on the part of less confident modes of carriage to continue the amendment to read ". . . giving due consideration to the objectives of the national transportation policy. . . ." The irony is that the National Transportation Policy (1940) is a mandate that the courts and the Commission *"preserve* a national transportation system by water, highway and rail, as well as other means. . . ." Thus, the second proviso of the enactment is open to construction as cancelling out the first, which is just what the Commission appears to have been doing, as a rule, post 1958. A proposed railroad rate reduction on newsprint was disallowed recently, because "a differential of approximately 10% under the rail rates is necessary to enable the water carriers to be in a position fairly to compete."[34] When the bankrupt New York, New Haven & Hartford Railroad tried to raise a little revenue by meeting the rates of competing cargo ships, the Commission forbade them to maintain a differential of less than 6%.[35] This from the agency which, in the eyes of much of the public 75 years ago, was going to emancipate them from excessive and burdensome charges.

Not all transportation has been dragged within the embraces of the ICC scheme. The hauling of bulk commodities by water carrier is exempt from regulation, as is motor carrier transportation of agricultural and fishery products. Similarly, producers who own their own transportation media (private carriage) may operate outside the pale of rate control. In past years, there has been a marked trend towards carriage by unregulated carriers; it has been estimated that since 1946, the ICC regulated fleets have been losing 1% each year of the total intercity freight volume to non-ICC regulated carriers.[36]

[31] The Commission had been told to consider, e.g., "The facts and circumstances attending the movement of traffic by the carrier or carriers to which the rates are applicable." See 49 U.S.C. §§15a (2), 316 (i), 907 (f), 1006 (d).

[32] Petroleum Products from Los Angeles to Arizona and New Mexico, 280 I.C.C. 509, 516 (1951).

[33] Canned Goods in Official Territory, 294 I.C.C. 371, 390 (1955).

[34] Newsprint Paper from Tenn. & Ala. to Houston, Tex.; I&S No. 7144; CCH Federal Carrier Cases ¶35,134 (1961).

[35] The I.C.C.'s decision was reversed by a three-judge federal court in New Haven on November 15, 1961. New York, New Haven and Hartford Railroad v. U.S., 199 F. Supp. 635. The government currently has an appeal pending before the Supreme Court, Dkt. No. 108.

[36] I.C.C. Staff Report, *Gray Areas of Transportation Operations* (1960), p. 13.

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If the present trend continues, private and exempt carriage can be expected to account for 39% of intercity freight not later than 1975.[37]

The implications of these findings would appear to be, first, the ICC is administering rates so high, that an increasing number of producers are finding it more economical either to buy their own carriers (those producers with sufficient traffic demands) or, where possible under the law, to apply for the services of exempt for-hire carriers. And, second, the striking growth of exempt carriers is powerful testimony that trucks, barges, etc., *can* be operated profitably at rate levels less than those now being administered by the ICC.[38]

In fact, one of the most telling commentaries upon the effects of ICC regulation centers about the "agricultural commodities" exemption clause. In 1953, by an interpretation of the statute, a United States District Court in Iowa ruled that eviscerated poultry was such an exempt commodity, and that therefore the ICC could not regulate the rates for the carriage of fresh slaughtered poultry by truck.

The ICC fought the ruling all the way up to the Supreme Court, but without success. A similar ruling with respect to frozen poultry was affirmed by the Supreme Court in 1956. Subsequently, the United States Department of Agriculture undertook a study to compare the transportation rates on unfrozen and frozen poultry, both before and after the respective decisions which freed them from ICC stewardship. The results showed that in 1956-57, poultry firms were paying 33% less for the transport of unfrozen poultry than they had had to pay in 1952, the last full year of ICC control. In the same 1956-57 period, frozen poultry rates had settled 36% below the prices the Commission had been supporting in 1955.[39]

WHAT MAKES THE ICC's protectionism especially serious is that today, as in 1887, the transportation industry is marked by overcapacity, which appears to be increasing at an accelerating rate. The so-called "Doyle Panel," commissioned by the Senate Committee on Commerce to undertake a study of the field, claims that *"The social investment (public and private costs) of transportation per unit of transportation performed is growing at a fantastic rate."* By 1975, *"transportation social investment will outrun the gross national product."*[40]

> The result of expansion of carrier investment and capacity at a rate that so far exceeds the growth of gross national product has resulted in an

[37] Report No. 445, 87th Cong. 1st Sess. (1961) pp. 81-82. (Hereinafter referred to as the "Doyle Report.") The author does not vouch for the accuracy of any of the Doyle Report's "findings." Note that on page 49 the Report seems to contradict itself in claiming that "private and exempt carriage can be expected to account for half of intercity freight not later than 1975." The Panel asserts on page 7 that since 1916 "the cumulative total of federal expenditures in highways, airways and waterways has come to approximately $23 billion. . . . "On page 166, the Panel sets the "monetary magnitude" of Federal aids to "highway transportation, to navigation, to aviation, and to the merchant marine" at "no less than $33.6 billion" since 1917. The Panel's chairman, John P. Doyle, is a retired air force general, and as such may not have been trained to trifle over $10 billion here or there.

[38] Although it ought to be noted that, to a certain extent, the duties the law imposes upon a regulated common carrier place certain "costs" (broadly defined) upon them which an unregulated carrier escapes. This need not, however, be an argument against unregulated carriage more than an argument against the imposed "costs."

[39] "Interstate Trucking of Fresh and Frozen Poultry under Agricultural Exemption," *Marketing Research Report No. 224* (Washington, D.C.: Dept. of Agriculture, 1958), p. 1. Certain objections to this study ought to be noted. First, it is not immediately apparent why the surveys chose 1952 and 1955, respectively, as the last years of regulation; in one case the District Court's opinion was selected as the terminal point (rather than the denial of certiorari by the Supreme Court in 1954) and in the other case the date was the Supreme Court's affirmance (rather than the District Court's opinion). The reasons should have been explained. Also, there was no "control" experience relating to the rate movements of regulated commodities by truck, during the same period, nor was there an attempt to correlate transport rates with, say, the wholesale price value of these commodities over the periods studied. The sampling of firms was conscientiously broad (those sampled in the 1956-57 period shipped 1.4 billion pounds), but the number of years analyzed deprived the study of some force.

[40] Doyle Report, p. 10. Italics in the original.

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> excess of transportation capacity that is unequalled in this century except during the major economic depressions of the thirties. Already decreased utilization of transportation plant has reached unusual proportions, and competition between carriers consequently has increased.[41]

Confronted with such a problem, and armed with experiences which were unavailable to the Collum Committee, some analysts might advocate freer competition to prune out the inefficient and to bring rates to a level which would discourage further superfluous capacity. But like the railroads of the 1880's, the Doyle Report's concern goes off along the opposite line of thought, advocating that there be "restraint of cutthroat competition from shipper pressures which is made possible by oversupply of transportation capacity. . . ."[42] Though the conclusion may seem paradoxical, it is the reasoning which is truly an affront. "Cutthroat competition" must be prevented, we are told, in order that the industry can meet the capital requirements necessary "to maintain and develop these facilities,"[43] i.e., the facilities which, so it is said, are already overdeveloped and too rapidly growing. In other words, read as a whole: we must have non-competitive prices, because under the current and lamented *excess of capacity*, if competitive pricing were allowed, the lower rates which would surely ensue would make the field less attractive to investors, and so frustrate *the maintenance and increasing of capacity*.

It is in line with this illogic—and from their inherent senses of "fair play"—that the Commissioners wish to continue to exercise their minimum rate power. And as for unregulated carriage, the fact that many an American business man is rebelling against the ICC's family has provoked the Commission to spread its protective wings, rather than to surrender power: "The public interest in stable, reasonable and properly regulated rates cannot find expression in the complete absence of control of such a large segment of the bulk carrying trade." The ICC's alternative legislative "solution" would be simply to abolish unregulated water carriage and to limit severely the agricultural commodities loophole.[44]

These views are just symptomatic of a broad range of Commission attitudes which portend a continuing uneconomical investment in transportation capacity—along roads which promise the public no end to uncompetitively high rates.

WRITING IN THE *Yale Law Journal* a decade ago, Harvard Professor Samuel Huntington suggested that "the ICC should be abolished as an independent agency" for the failure of its outlook to be "as comprehensive as the interests of the whole country."[45] Some years later, his colleague, Louis Jaffe, responded in the same forum that the critics' "real quarrel" with the administrative agencies, "if they would but recognize and admit it, is with Congress." Using the Interstate Commerce Commission as an example, he observed:

> . . . can anyone find in the legislation of 1935 and 1940 an intention to establish competition as the presumptive norm of transportation regulation? . . . Everyone seems to be agreed that the railroads and the large truckers were the dominant forces in procuring that legislation. Was this in the name of competition? When somewhat later the Supreme Court came close to holding that railroad rate conferences were a violation of the antitrust laws, Congress, immediately immunized them. Was this another indication of a congressional mandate for competition?[46]

Though Jaffe conceded that "The ICC . . . is, at times, more tender of the railroad interests than even a fair reading of its mandate would require, and it may be less adventurous in permitting new competition than it might be,"[47] upon

[41] *Ibid.*, p. 8.
[42] *Ibid.*, p. 56.
[43] *Ibid.*, p. 50.
[44] *Ibid.*, p. 134.
[45] Huntington, "The Marasmus of the ICC," 61 *Yale L.J.* 467, 508 (1952), criticized in Jaffe, Book Review, 65 *Yale L.J.* 1068 (1956) and Jaffe, "The Effective Limits of the Administrative Process: A Re-evaluation," 67 *Harvard L. R.* 1105 (1954).
[46] Jaffe, Book Review, 65 *Yale L. J.* 1068, 1072, (1956).
[47] *Ibid.*, p. 1073.

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his view, it ought to be recognized that the Commission is generally doing the job which Congress wanted done.

These two views need not be inconsistent. One could agree both with Jaffe —that the ICC staff is not to be blamed for doing the job that "Congress" wanted done—and with Huntington—that the ICC ought to be abolished rather than permitted to continue a job so often irreconcilable with the public interest.

Huntington's "solution," however (rather astonishing in the context of his documented cynicism about federal regulation), was to replace the abolished ICC with *three new* commissions: one, it may be presumed, to be dominated by water interests, one by truckers, and one by the railroads.[48] Perhaps a more worthwhile future for transportation regulation would be to divest the ICC at least of the powers discussed in this article, and to explore the withdrawal of federal financial patronage to an already over-invested segment of the economy.

No doubt the problems which deregulation would raise are extraordinarily complex. To take one specific problem (outside the immediate concern of the ICC), permanent federal subsidization of the inland waterways is a fine example of indefensible governmental intrusion. Why should those who do not directly benefit from the waterways pay for those who do? Many have suggested as an alternative that a "user charge" be imposed to make the users of the waterways bear the full expenses of their maintenance. On the other hand, even granted that the present transportation network is the child of economically irrational forces, one must recognize, too, that as the system has developed, patterns of commerce have adjusted themselves to it. The Ohio Valley (with the important Pittsburgh-Youngstown iron and steel district) has in no small way been built upon cheap water transportation. Much of Southern industry, too, has been driven to the banks of the Mississippi by improvidently high rail charges. Until we know more about the repercussions a user charge would have upon such fundamental industrial networks, more about the ability of railroads and trucks to "fill in" with service at comparable cost to users, and more about the competitive implications in the product market of increasing the raw material costs of waterway industry, changes ought to be instituted with some respect for the awesome magnitude of the task.

Nonetheless, the future direction of governmental control is indicated. The transportation industry can and ought to be sheared of its supports, whether they be the meting out of direct subsidies or ICC regulation of prices. Artificial props can be removed gradually, one by one, so that the impact may be gauged without taking an eye off any imagined danger spots. No doubt many persons in the transportation industry will agree with the Doyle Report's advice that "Experience in the United States . . . with unrestricted competition in ratemaking by carriers has not been happy."[49] But assuming that General Doyle means "not been happy" for the public (rather than for the transportation industry, with which the report appears more tenderly concerned), it ought to be remarked that unrestricted competition has not been widely *tried* in 75 years. And where it has been tried, as with agricultural exempt commodities, the experience has indeed been "happy"—for the farmers and for the consuming public.

Moreover, since the foundation of the ICC, two other developments have greatly altered the need for regulation. First, the relative railroad power of the 1880's has considerably diminished. As of a few years ago, an ICC study on percentage distribution of intercity freight traffic revealed that the railroads accounted for 45% of revenue ton-miles; motor vehicles, 22%; the inland waterways (including the Great Lakes), 15%; and oil pipelines, 18%.[50] Second, a large body of antitrust law has developed in the interim. It is true that a well oiled transportation lobby has managed to produce some special exemptive legislation (and the Doyle Panel would extend present exemptions

[48] Huntington, op. *cit.*, p. 508.

[49] Doyle Report, p. 419.

[50] *Intercity Ton Miles* (Washington, D.C.: ICC, Bureau of Transport Economics and Statistics, 1961).

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to legitimize rate-rigging by every mode of carriage). On the other hand, if only the antitrust umbrella would be repealed, the existence of the antitrust laws would actually make the withdrawal of institutionalized regulation more feasible today than ever before. Antitrust, thoughtfully applied to transportation, could allay many of the past fears about abusive practices and huge amalgamations of power.

Indeed, one can not help but wonder how much substance there is to some of the fears voiced against deregulation. The supposed need for minimum rate regulation is a case in point. Advocates of maintaining the Commission's power have maintained (1) that if the railroads are allowed to put lower rates in force along waterways and major highway trunk routes, the rates will "have to be" raised in the less competitive areas; (2) that if control is relaxed, the railroads will lower their rates and destroy competing modes of carriage; (3) that, having destroyed competing modes, the rails will raise their rates to a higher level than that which had obtained previously, to the detriment of the public.

The first of these arguments sounds like a restatement of the "recoupment fallacy" so ably and decisively repudiated by Professor Morris A. Adelman of MIT in another context.[51] The railroads, generally, are maintaining rates well below the maxima the Commission has allowed them (much less the maxima the Commission probably would allow them on request). If the railroads could make more net revenue in the less competitive areas by raising their rates higher than those which presently obtain, they would have done so already; it is hard to see how rate changes in the competitive areas alter either the feasibility or the profitability of rate advances in non-competitive regions. Thus, it is not credible that "because" the railroads lower their rates to meet water and truck competition, they "will have" to raise them elsewhere. The argument is based on some rather primitive theories about pricing.

The second supposed justification for rate minima is no more compelling: that the railroads will use their potential for better service and lower rates to destroy competing modes. If the underlying assumptions of the argument are correct, the issue so stated is as simple as whether we want to sustain and encourage investment in inefficient transport media by recourse to artificial price supports.

The third argument is the one which demands the most attention although it, too, may well prove dubious. Even if the railroads could lower their prices enough to drive truck competition from select major routes, it is not immediately apparent how the rails could thereafter "simply" recoup their short-term losses with new, higher-than-ever rates. Their ability to do so would be a function of the costs to truckers of reestablishing themselves in the affected area. And trucks, once driven off (the image of "destroyed" is unfortunately misleading), could probably swarm back like flies; higher-than-ever rates would be frustrated by attracting a more-than-ever number of trucks.

Water transportation, however—especially by intercoastal carrier—is subject to certain economies of scale which make the long-run effects of railroad price depressing less amenable to *a priori* analysis. What is needed is a follow-up study of the actual effects of cases in which lowered rates have driven away intercoastal competitors, to determine whether the railroads have, in fact, been able to enlarge their power over the public. The entire area is, indeed, riddled with a number of intangibles. But even if there proves to be some risk of objectionable price cutting, one may wonder whether the mere possibility justifies the imposition of an objectionable rate umbrella. If there are bona fide victims of "*predatory* prices" (as opposed to victims of *lower* prices and their own inefficiency), it would seem as though the established procedures for private antitrust suits would be a solution preferable to the perpetuation of the ICC.

[51] Adelman, "Effective Competition and the Antitrust Laws," 61 *Harvard L. R.* 1290 (1948).

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THE REGULATORY BUREAUS:

CAB: Freedom from Competition

SAM PELTZMAN

BACK IN THE days when air travel was still considered something of a stunt, the early pioneers of the civil aviation industry begged to be taken seriously. They wanted their industry to be treated just like any other form of transportation, and that meant being regulated and subsidized by a full-fledged federal authority. The federal government had, after all, granted its protection to the railroads, ships, trucks, and busses, and civil aviation remained much the neglected child of the transportation industry. The federal government's insouciance ended when, in the summer of 1938, Congress passed the Civil Aeronautics Act in which the Civil Aeronautics Authority (now Civil Aeronautics Board) was formed. The industry exulted:

> Tension relaxed. The battle had been won. At last civil aviation had come into its own with its own agency. . . .[1]

> The Civil Aeronautics Act is the Magna Charta of aviation. With some defects and some uncertainties, it is nevertheless the finest thing that has happened to aviation since the World War conclusively proved its practicality.[2]

This "Magna Charta" gives the Civil Aeronautics Board extremely broad powers to regulate the economic aspects of civil aviation,[3] the most important of which concern the routes flown by air lines and the fares they charge.

All passenger, cargo, and mail rates, while they are initially set by the airlines, require approval by the CAB. In addition, the CAB may, when it deems these rates not "just and reasonable," fix maximum or minimum rates or both. Operation of an airline in interstate commerce requires a certificate of "public convenience and necessity" from the CAB, except that the so-called "grandfather carriers" (those airlines in operation at the time the Act was passed) received such certificates automatically. The CAB determines which airline may serve which cities, and it may regulate the number of flights to a city. Additionally, the CAB is empowered to grant subsidies to the airlines and to rule on mergers. These regulatory powers remain essentially the same today as those granted in the 1938 Act. It was thought at that time that, as an "infant industry," civil aviation required subsidies and pro-

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[1] 3 *American Aviation* No. 23, May 1, 1940, p. 1, cited in Lindsey, John M., *The Legislative Development of Civil Aviation, 1938-1958* (Washington: Civil Aeronautics Board, 1962), p. 3n.

[2] Logan, "Aeronautical Law Developments, 1939," 11 *Journal of Air Law and Commerce* 1 (1940), 16, cited in Lindsey, *op. cit.*, p. 1n.

[3] The Civil Aeronautics Board has two major functions in addition to economic regulation; it assists the State Department in negotiating the rights of U. S. international airlines with foreign governments, and it investigates air accidents and makes recommendations on air safety rules to the Federal Aviation Agency. The Federal Aviation Agency, created in the Federal Aviation Act of 1958, administers air safety laws and the air traffic control system. This article will deal only with economic regulation by the CAB of domestic airlines.

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tection from competition if it were to develop properly. However, as is the case with many such infants, they never seem to grow old enough for the subsidies and regulation to be discontinued. In fact, while consideration of the "public interest" is supposed to provide the *raison d'etre* for economic regulation of the airlines, there is much to indicate that the CAB acts in great measure to protect the airlines at the expense of the public interest.

The case of the non-scheduled airlines (today known as "supplemental" airlines) provides perhaps the clearest illustration of this. These are small carriers which do not operate on published schedules or fixed routes, but rather seek to utilize their aircraft as fully as possible by adjusting quickly to changes in air traffic patterns. This results in a considerable cost reduction over the type of service provided by regularly scheduled airlines. After World War II, these airlines, which were exempted from CAB regulation in 1938, began using this cost advantage to undercut the rates of the regularly scheduled airlines.[4] They grew in number and some began providing fairly regular service. The regularly scheduled airlines, facing real competition for the first time, retaliated by inaugurating low cost air-coach service. This was nothing more than the normal results of increased competition such as would obtain in any other growing industry—lower prices, more variety of service, etc. However, the regularly scheduled airlines, unlike other industries, had available the full force of federal law, incarnate in the CAB, with which to escape the rigors of competition. In 1947 non-scheduled airlines were required to register with the CAB; in 1949 the blanket exemption from regulation was dropped, and each of the nonskeds (as these airlines were popularly known) was required to file for exemption individually; in 1951 the CAB began limiting nonsked operations. With the aid of an important Supreme Court decision affirming CAB control over the nonskeds,[5] this limitation has proceeded more or less systematically. The number of nonskeds dropped from 150 in 1947 to 50 by 1957.[6] In 1959 the CAB ordered 12 of those remaining to cease operations; the lines allowed to continue flying received temporary operating certificates for from two to five years. Several of the two-year certificates have recently lapsed without being renewed. Thus, for example, on the New York-Chicago route, most heavily traveled in the country, the number of supplemental flights is now only ten per month as against thirty in 1961. The day may not be far off when the supplemental airlines will be eliminated altogether. This systematic reduction of competition cannot be justified on grounds of public interest. It might possibly be justified on grounds of safety if, as has been charged, the supplemental carriers do not maintain as safe operations as the scheduled airlines. However, the CAB itself dismisses this as a cause for forcing the supplementals out of business:

> There is no factual showing that the applicants [for operating certificates] have failed to adhere to required safety standards. . . . Moreover regulatory control for safety purposes is maintained over supplemental carriers as it is over holders of route certificates.[7]

Rather, the CAB pointed to lack of "going concern status" and lack of "ability to operate" as the major reasons for denying applications.[8] At best, these vague criteria are merely lame excuses for restricting competition; at worst, they constitute a blatant interference on the part of a regulatory body with the right of management to take financial risks.[9]

[4] Cf. Wilcox, Clair, *Public Policies Toward Business* (Homewood, Ill.: Irwin, 1960), p. 680.

[5] North American Airlines v. C.A.B., 353 *U.S.* 941.

[6] Wilcox, *op. cit.*, p. 676.

[7] 28 *C.A.B.* 224 (1959), 238.

[8] *Loc. cit.*

[9] Unfortunately criteria such as these are employed constantly at CAB hearings. Thus, to take a recent example, Continental Airlines is denied a certificate for operation between Los Angeles and San Francisco because, among other things: "*Continental* would be required to install new terminal facilities at San Francisco and Oakland and incur substantial promotional and advertising expenses in establishing itself in the market," while TWA is favored because it "has the advantage of a long standing identity in this market." *Pacific Southwest Local Service Case*, Order E-17950, January 25, 1962 (Washington, D. C.: Civil Aeronautics Board), p. 27 (italics supplied).

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The CAB's attitude toward the supplementals was neatly summarized by its chairman at the time of a Congressional inquiry into the supplemental air carrier industry. He told that inquiry:

> . . . we have felt it to be our duty under the Civil Aeronautics Act to see to it that the irregular [supplemental] air carriers should do the job which we authorized them to do and . . . not to compete with the certificated air-transport structure of the nation.[10]

Putting the supplementals out of business has not been the only way in which the CAB has protected the certificated air-transport structure of the nation from the scourge of competition. In an industry which has grown as rapidly as has civil aviation, it is inevitable that many new firms will seek to enter the field. The CAB has in fact received over 150 applications for the establishment of new scheduled airline companies since it was formed. *In all the years of its existence, it has not approved a single one of these applications.*[11] While the CAB insists that it is trying to promote competition in the air transport industry,[12] all that it has done in this regard is to shuffle routes among the favored "grandfather carriers." Further, it is now trying to make the club even more exclusive. The current CAB chairman has issued a call for mergers to reduce "excess competition."[13]

EVEN IF THE CAB has stifled competition by limiting and even reducing the number of firms engaging in air transport, the situation might still be mitigated if it encouraged competition among already existing airlines in the fares they charge for their services. However, the CAB's record does not show that it has acted this way, nor is it clear that the CAB could, given the legal framework under which it operates, have done much to encourage competition. The very fact that all fares must by law be filed with the CAB and receive its approval after a hearing creates a natural tendency away from price competition. When an airline is required to publicize a rate cut before the fact and when it knows that its rivals will likely retaliate before the first CAB hearing, the temporary gains of price cutting, which so often stimulate it in other industries, disappear. There is thus a strong incentive for individual airlines not to initiate rate cuts, and this is endemic to the legal structure. In general, however, the CAB has not been anxious to promote price competition even where it might have been able to do so. The prevailing CAB attitude here is perhaps best seen in its decision in the *General Passenger Fare Investigation*. This four-year investigation into the fare structure sought to determine what a "fair and reasonable" return on investment would be for the trunk (inter-regional) airlines and to set rate making standards to achieve that return. It found 10.5% to be such a "fair and reasonable" return for the airline industry.[14] It is hardly surprising, in view of the CAB's solicitude for the airlines as shown in its policy toward the nonskeds, that this was a rate considerably in excess of that being earned by the airlines at the time of the investigation.[15] The CAB then set forth the rate-making standard which would be applied in attaining this goal:

> Where the bulk of the carriers fall within a reasonable range of the rates of return found herein to be proper . . . fare adjustments should normally be based upon the results for the *industry as a group.*
>
> In effect, the entire domestic trunkline industry would be regulated so as to produce an over-all rate of return to the industry equal to [10.5] percent.[16]

This standard, which is to govern future rate making decisions by the CAB, dis-

[10] *Future of Irregular Airlines in United States Air Transportation Industry.* Hearings before a sub-committee of the Select Committee on Small Business, U. S. Senate (Washington, D. C., 1953), p. 8.

[11] Wilcox, *op. cit.*, p. 677.

[12] For just one example of this insistence, see discussion at 27 *C.A.B.* 829.

[13] *New York Times*, Nov. 4, 1961.

[14] *General Passenger Fare Investigation*, Order E-16068, Nov. 25, 1960 (Washington, D. C.: Civil Aeronautics Board), p. 13.

[15] *Ibid.*, Appendix A, p. A-1.

[16] *Ibid.*, p. 75 (italics supplied); p. 72.

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tinctly reduces the possibility of significant price competition. For, suppose an airline were to come up with some method to cut its costs. One way it could capitalize on this would be to cut its fares and win business from its competitors. However, it is possible that, if it did so, the losses of its competitors might exceed the gains to the rate cutting airline, and the rate of return to the industry would fall below the "fair and reasonable" rate. The Board, if it felt this was likely to be the result of the fare cut, would be required, under the standard it has set up, to reject any proposed fare reduction. What seems likely to evolve is something like rate setting by majority vote of the airlines or by that faction which can convince the CAB that its particular rate proposal will bring the 10.5% return to the industry. Clearly, if the industry is to be treated as a group, independent and diverse rate setting policies could not be tolerated. This is hinted at when the Board states:

> It is thus clear that the proper fare level must be found at some point between the needs of the most profitable and least profitable carriers. . . .[17]

If this means anything, it surely means that an efficient airline could not be permitted to institute fare reductions which threatened the existence of inefficient carriers, as this would surely be contrary to the "needs" of the latter. In treating the industry as a corporate entity, the benefits of price competition to the consumer are thus to be made subservient to the "needs" of the carriers. The CAB did not wait long before implementing its announced policy. Even before the *General Passenger Fare Investigation* report was issued, it made permanent a temporary fare increase and authorized a new increase, the total of the two being 6½% plus $2 per ticket.[18] This applied to all trunk airlines, and all of them adopted the new fares immediately. This uniformity, in the face of the great variety of market conditions in an area as large as the United States, is hardly the mark of a vigorously competitive industry.

This absence of reliance on price competition apparently stems from the CAB's view of the airline industry as a public utility,[19] about which the CAB examiner in the fare investigation had this to say:

> Unbridled competition tends to be destructive in the case of utilities resulting in widely fluctuating prices, equally fluctuating profits, and bankruptcy for most of the competitors. Thus, bankruptcy eliminates the competition and tends toward monopoly, which without the check of competition has no economic regulator on prices or profits. Consequently, regulation was developed to do the job competition could not do with respect to public utilities.

How this can possibly be taken to apply to the airline industry where it was not "unbridled competition" but deliberate, pertinacious CAB policy which reduced the number of competitors is something beyond the ken of this author. The examiner goes on to say:

> . . . the restriction on entry of new carriers into the business and of existing carriers into areas not covered by their certificates renders it impossible to conclude . . . that free-market forces can be depended upon to prevent either too low or too high returns on capital.[20]

However, if it then follows that free-market forces will be efficient regulators of prices and profits under conditions of free entry, the CAB must explain why it has not permitted first free entry and then free competition.

That the collective pricing judgment of a dominant group will not always be wiser than that of a single aggressive innovator can be seen in a recent case in which the CAB temporarily relented in applying its rate making standards. In 1961, Continental Airlines, eleventh largest of the twelve domestic trunk airlines, attempted to reduce coach fares 20% on its Chicago-Los Angeles route. Its three competitors, United, American, and TWA (first, second, and third, respec-

[17] *Ibid.*, p. 74.

[18] CAB Press Release, June 17, 1960.

[19] Cf. *General Passenger Fare Investigation*, Appendix A, p. 2 ff.

[20] *Ibid.*, Appendix A, pp. 3-4.

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tively), filed protests with the CAB.[21] Consistent with its rate making policy, the CAB ruled against Continental and the fare reduction.[22] Recently, however, the CAB has permitted the reduction for a trial period, and Continental's three competitors have been forced to meet its fares. The results to date: non-stop traffic between Chicago and Los Angeles rose about 30% in the last four months of 1962 (the time in which the new fares were effective), revenues rose 15%. This contrasts with reductions of 7% and 9% in traffic and revenues respectively in the previous months of 1962. Continental's expenses were cut by $360,000 on an annual basis by eliminating free meals on the coach flights.[23] It is still an open question as to how far the CAB will allow this attempt at price competition on an important route to go, but the Continental case illustrates what a gross mistake it is to treat the airline industry as a single public utility. In the airline industry, no less than in any other, it is the experimentation and innovation of independent firms and individuals which can, if it is given free reign, bring about the greatest progress.

While the Continental Chicago-Los Angeles fare reduction is still classed as an "experiment" by the CAB, and its permanence is in doubt, one of the few important routes in the country which has seen extensive and permanent price competition is the San Diego-Los Angeles-San Francisco route. This occurred when Pacific Southwest Airlines purchased new equipment and proceeded to undercut the fares of its bigger competitors. This has been a highly successful policy for Pacific Southwest (and, we may assume, for its customers).[24] The "catch" here is that Pacific Southwest operates wholly within the state of California, and, since the CAB's jurisdiction on fares extends only to firms engaged in interstate commerce, it is free of CAB rate-making policy.

ON THE BASIS of its record over the past 24 years, it is obvious that the CAB has acted as a focal point for the organization of a compulsory cartel in domestic civil aviation. The CAB itself has actively restricted entry into civil aviation by new firms and eliminated old ones, and it has reduced the scope of price competition between airlines. While it may be true that it could do little, given the law, about the lack of price competition, it is interesting to ask why it should have restricted entry to the extent it has. The simplest answer is that it is a deliberately perverse organization beholden to the regularly scheduled airlines. This is not necessarily the correct answer, however. Quite often regulatory agencies, set up in the "public interest," sincerely identify that interest with the interests of the industry they are supposed to regulate. Looked at from the viewpoint of the regulators, this does not seem unreasonable. To them the "public interest" presents itself as a highly diffuse quantity, in the case of the CAB a traveling public of millions of individuals, with a viewpoint seldom articulated at hearings. The interest of the airlines (always set forth by them as the same as the public interest) is seen in concrete, specific terms and is always pressed insistently before the CAB. The airlines have, after all, a far greater incentive to win the CAB over to their mode of thinking than does any individual purchaser of their services. It is thus natural to expect the airlines to expend more money and effort to convince the CAB that their interest is identical to the general interest. These efforts have not been without success. As one commentator put it:

> The present regulatory system for civil aviation with its primary emphasis on protection of the regulatees from competition, was "sold" partly on the basis of the . . . vague identification of the financial welfare of particular carriers with the satisfaction of national need. . . .[25]

The way in which the CAB confused special interest with the general interest can

[21] Cf. *New York Times*, Oct. 31, 1961; Nov. 16, 1961.
[22] *New York Times*, Nov. 23, 1961.
[23] Cf. *Wall Street Journal*, Jan. 22, 1963.
[24] *Wall Street Journal*, Nov. 9, 1959.
[25] Keyes, Lucile S., "National Policy Toward Commercial Aviation—Some Basic Problems," 16 *Journal of Air Law and Commerce* 280 (1949), 294.

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be seen in the Congressional hearings on the non-scheduled airlines. The regularly scheduled carriers took the position that the nonskeds were "skimming the cream" off their business on major routes, leaving them unremunerative business in small towns. If the regularly scheduled carriers were to continue to provide service to small towns at unremunerative rates, they needed the profits on major routes; hence, the nonskeds had to be restricted, since the "public interest" clearly required extensive air routes all over the country.[26] Superficially, it might seem reasonable that the "public interest" indeed required the provision of scheduled air service to small towns at unremunerative rates, and, in fact, the CAB chairman took that stand at the hearings. Yet, even if we accept what is doubtful—that rates to small towns were in fact "unremunerative" in any meaningful sense, the uneconomic utilization of transport facilities this entails (diversion of planes from routes on which their services are more valuable, underutilization of existing rail and highway facilities, etc.) is not in the public interest. At best, it serves the interests of the particular group of people who use scheduled air service to small towns at the expense of those who travel on major routes. Were the subsidies and protection withdrawn, this inefficient rate structure would disappear. So it is with the two other reasons most frequently cited in defense of limiting entry into the airline industry, namely that it is essential to the maintenance of proper safety standards and that it is necessary to the maintenance of regularly scheduled service.[27] As to the first of these, we have already seen that the CAB doesn't really believe it itself; safety regulation and economic regulation are essentially separate matters. As to the second, one authority has concluded that the competitive pressures in the airline industry are such as to work toward greater rather than less regularity of service.[28] More to the point, we need ask why regularly scheduled service is in the public interest if it is true that the public doesn't want it. Undoubtedly, the CAB's defense, that limiting competition is in the public interest, is completely sincere, though, in this writer's opinion, it is without a convincing argument in its favor. This is a situation, however, which typically arises when the uncoerced decisions of the market-place are replaced by the arbitrary decisions of an agency of the State.

IT IS INTERESTING to examine the economic situation of the airline industry after 24 years of regulation by the CAB. In addition to limiting entry and discouraging price competition, the CAB has provided outright subsidies to the major airlines; it now provides them indirectly by subsidizing local service carriers which provide much "feeder" traffic to the trunk lines. The industry is further subsidized by federal aid to airport construction under the Federal Airport Act of 1946. Moreover, along with all this assistance to the airlines, the public's acceptance of air travel has made it one of the fastest growing industries in the United States. From 1947 to 1961, for example, the number of passenger-miles (number of passengers times miles flown per passenger) flown by the airlines has increased from 6.0 billion to 29.5 billion, or about 400%.[29] This is a combination of circumstances which, one would have thought, would have been highly profitable for the airlines. However, this has not been the case. In the face of a slowdown in the *rate* of increase in revenue (revenues still grew absolutely), domestic trunk lines lost 34.6 million dollars in 1961.[30] One major trunk line (Capital) averted bankruptcy by merger, another (Northeast) has been temporarily saved from bankruptcy by financial assistance

[26] See testimony of any certified airline executive in Select Committee on Small Business, *op. cit.*

[27] Kaysen, Carl, and Donald Turner, *Antitrust Policy: An Economic and Legal Analysis* (Cambridge, Mass.: Harvard University Press, 1959), p. 205.

[28] Keyes, Lucile S., "A Reconsideration of Federal Control of Entry into Air Transportation," 22 *Journal of Air Law and Commerce* (1955) cited in Kaysen, *loc. cit.*

[29] *Moody's Transportation Manual* (1962 edition), p. a69.

[30] *Ibid.*, p. a71.

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from the Hughes Tool Co. Trans World Airlines, third largest in the nation, suffered a loss of 38.7 million dollars in 1961.[31] The largest domestic trunk line, United, had a return on stockholders' investment of about 2% in the same year as opposed to the roughly 10% which is average in other industries.[32] While it would be wrong to say that the domestic airline industry faces a financial crisis, it is apparent that, in spite of all the help it has received, important segments of it are not in the most robust health. Though it may seem paradoxical, this state of ill-health has been induced, to some degree, by an overdose in its adult life of what was the airlines' sustenance as an infant—CAB regulation and subsidies.

Regulation contributes to the current financial difficulties of the airlines by introducing inflexibility into their operations. Abandonment of a route, to cite one example, requires often lengthy CAB hearings and CAB permission. Thus, except in periods of rapid overall growth in which every route shares to some degree, an airline is liable to find itself flying virtually empty planes on routes experiencing falling traffic for some time, before (and if) it is permitted to abandon them. Similarly, these empty planes cannot readily be shifted to new, more rapidly growing routes before the necessary hearings and certificates of convenience and necessity are obtained. The inefficiencies inherent in such a situation will, if anything, become more troublesome now that the period of most rapid growth for the airlines is apparently ending. Another type of inflexibility induced by regulation finds its source in the rate-making policies fostered by the Civil Aeronautics Act and CAB policy. Airlines, finding it difficult to engage in price competition with each other, compete primarily in the services they offer—e.g., free meals, lavish terminals, faster schedules. Thus, when the jet transport was introduced, each airline felt compelled to introduce them as rapidly as possible to meet its competitors with little regard to the slowdown in traffic growth occurring at the same time. No real attempt was made to create new classes of service (such as those offered by the supplementals) which would have, by lowering the fares on piston planes, utilized them more fully and caused the jets to be introduced at a rate more in keeping with the growth of traffic. Certainly, no new airlines were chartered which might have utilized the piston planes being sold by the airlines converting to jets. All that happened was that piston fares were kept constant while a jet surcharge was introduced. On many routes, the passenger is not even afforded the chance to take advantage of the lower relative cost of piston flights because these routes are currently being served only by jet flights. The net result of an inflexible rate structure in a period of rapid expansion of the jet fleet has been a sharp increase in the number of empty seats on scheduled flights. At $5,000,000 per jet plane, this can be and has been, quite costly. Given a continuation of the present regulatory set-up, however, we will likely witness much the same thing when the supersonic passenger plane is introduced in the 1970's.

We can conclude that the heavy protection and subsidization of the airlines has been only a mixed blessing even to them. It has, by choking off new sources of competition and discouraging competition among existing airlines, worked against the "public interest" it was created to serve. Quite clearly, it is legitimate to ask what the alternatives to the present regulatory policy are.

In the opinion of this writer, one simple alternative presents itself as the most preferable—abolition of the CAB in all its economic functions. (While I am also in favor of having both the CAB and FAA withdraw from safety regulation, discussion of this is beyond the scope of this article.) If what we mean by "public interest" here is the satisfaction of market demands, in all their variety, at lowest social cost and, as part of this, the quick adaptability to changing market conditions, then our history indicates that this interest is best served by competition free of arbitrary interference by State power. It is not served by reserving

[31] *Ibid.*, p. 1298.

[32] *The Fortune Directory* (New York: Time, Inc., 1962), p. 31.

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civil aviation as the exclusive domain of "grandfather carriers;" it is not served by government supervision of minimum rates; it is not served by compelling the community to pay, in the form of government subsidies, for services provided by and to favored groups. It is true the end of government interference and protection of the airlines will cause some painful readjustments in the air transport industry. Allowing new firms to enter the industry freely and permitting all firms to serve whatever routes they choose to will, judging by the success of the supplementals before their ranks were decimated by the CAB, and the success of Pacific Southwest on the west coast, likely lead to a reduction in the fare level. It will cause a reduction in service on subsidized and poorly patronized routes, increases in service on other routes. With the pressures of competition substituted for bureaucratic controls, airlines would be compelled to adjust services and fares as quickly as possible to changing market conditions. Failure to do so, given the relative ease with which the airline business could be entered into and the great mobility of the basic capital equipment, would result in quick loss of business to new competitors. All of this is surely in the public interest, but it just as surely will force inefficient airlines out of business. However, unless inefficiency is constantly penalized, the airline industry itself will not be healthy for long. We have already seen what has happened to certain parts of the industry in the face of a mere slowdown in the rate of traffic growth. Further protection of inefficiency will only lead to further financial difficulties, more controls and possible ultimate nationalization of the industry. There is no compelling reason for allowing this to happen. Neither is there any reason to believe that the benefits of free competition cannot serve the general interest as well in the air transport industry as it has in other industries. So far, however, we have not given free competition a chance in this industry. We might do worse than to try it.

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THE REGULATORY BUREAUS:

FCC: Free Speech, "Public Needs," and Mr. Minow

ROBERT M. HURT

THE PANORAMA confronting television viewers may recently have passed the cost of living as a universal cause for complaint. It is no wonder that FCC Chairman Newton Minow's crusade to induce broadcasters to cater to our nation's more refined tastes (meaning of course your tastes and mine!) has been greeted with considerable enthusiasm. In this case most of the iceberg is well below the surface; the popularity of Minow's cause has obscured the challenge to a free society implicit in his approach. In this article I hope to point out some of the dangers inherent in both past Commission policy and in Minow's present course. While the Commission performs such diverse functions as regulation of private telephone and telegraph rates,[1] research in communication technology, and supervision of future communications satellites, I deal here with the Commission's most controversial function: allocation of available radio and television frequencies among applicants and subsequent supervision of their use. I conclude with some brief suggestions as to how the problems discussed might be solved.[2]

My position can be summed up as follows: When some form of legal regulation of the air waves became inevitable, Congress chose a method that would lead to problems of excessive government control no matter how well intentioned those appointed to supervise the air waves would prove to be. As a result, during the next three decades a philosophy of public ownership and control of the airwaves became crystallized, although the Commission was generally restrained in its application of this philosophy. Finally, when public sentiment against broadcasters became strong enough, we were so accustomed to according a special "public" status to the broadcasting industry that the appearance of Minow as a tribune of the public interest seemed natural. The seemingly benevolent and non-despotic nature of his crusade obscures the fact that his program requires markedly increased bureaucratic supervision of what "the public interest requires" in the way of programming. Nowhere in the vast structure of govern-

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[1] Problems raised by rate regulation are covered in the preceding two articles. FCC rate regulation is often as exotic as that of the ICC and CAB, as is indicated by a recent report in the *Wall Street Journal:* "The FCC found that both companies were earning about 3% on their private telegraph services and ordered [!] them to boost rates so that AT&T would earn about 7¼% and Western Union about 9%." January 30, 1963.

[2] My suggested solutions, as well as much of my background material, are taken largely from an article by R. H. Coase which this writer considers a classic of applied economic theory: "The Federal Communications Commission," *Journal of Law and Economics,* October, 1959, pp. 1-40. I recommend this article for those who wish a more sophisticated development of the issues presented here.

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mental regulation of our way of life can one better apply Tocqueville's warning against that

> . . . immense and tutelary power which takes upon itself alone to secure [men's] gratifications and to watch over their fate. This power is absolute, minute, regular, provident, and mild.

WHILE RADIO WAS first used commercially at the turn of the century, there was no urgent need for legal regulation of broadcasting until 1922, when the number of broadcasting stations increased from 60 to 564. Secretary of Commerce Herbert Hoover, who was authorized to grant broadcasting licenses under a 1912 Act of Congress, attempted to prevent new stations from interfering with one another and with existing stations by writing into new licenses the wave lengths the licensee could use and the hours he could broadcast. However, in 1926 a federal court held that the Secretary could not attach such conditions to a license under the 1912 Act. The result of this decision was chaos and confusion. Over two hundred stations were built during the next nine months, and existing stations no longer limited themselves to frequencies allocated in their licenses. Interference was rampant and radio reception was described as a "Babel of tongues."

Obviously some form of legal intervention was necessary here. Available radio and television frequencies are like any scarce resource in that they are not open to universal and unrestricted use without their value being destroyed or seriously impaired. There is room on the frequency spectrum for only 106 AM radio channels, 50 FM radio channels, 12 very high frequency television channels, and 70 ultra high frequency television channels, if interference is to be avoided. Since stations far enough apart can operate on the same frequencies without interference, there would be room in the entire nation for 3,000 AM stations, 2,000 FM stations, 619 VHF stations, and 1,432 UHF stations.[3] Invariably there have been many more potential users than available airspace.

Consequently, broadcasting frequencies, like land, would have to be rationed in some way among potential users. Just as the same frequencies cannot be used in a community by two broadcasters without interference which would drown out or seriously hinder one or both, a tract of fertile land would lose most of its value if everyone were free to attempt to sow or reap it. To give an analogy closer to the problem of radio interference, land would lose its value for cultivation if anyone could graze his domestic animals on it. The same is true of any scarce factor of production, whether a natural resource such as iron ore or a finished product such as a machine. In these cases the rationing problem has been met by rules of property laid down by courts and legislatures, by which property rights are defined and protection is given against interference.

Several alternative forms of legal regulation were available at this point, and we will explore some of them later. But a 1925 Senate resolution set the pattern to be followed by declaring that the "ether" was an "inalienable possession of the people of the United States . . ." and the first Congressional response to the 1926 court decision was to require all licensees to execute "a waiver of any right or of any claim to any right, as against the United States, to any wave length or to the use of the ether in radio transmission." This was due partly to a reaction against the scandalous giveaway of public lands before the turn of the century to railroads and other private interests. But while it may not have been universally recognized at the time, the first corollary to "public ownership of the ether" would be the doctrine that broadcasters were in some sense trustees bound to act in the interest of the public,

[3] Wilcox, *Public Policies Toward Business* (Homewood, Ill.: Irwin, 1959), pp. 697-701. These figures are based, first, on the rather arbitrary Commission allocation of available airspace among broadcasters and other domestic and governmental users, and, second, on the Commission's fixed rules determining how many frequencies each station may use. As Coase suggests, *op. cit.*, different methods of allocation might result in a substantially different number of stations. These figures merely demonstrate that there will be a substantial limitation on the number of stations.

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since they were using the property of the public. The inevitable second corollary is that government is the tribune of the people that must enforce this duty.[4]

In 1927 an Act of Congress created the Federal Radio Commission, which was authorized to issue licenses for use of airwaves only when "the public interest, necessity, or convenience would be served" by so doing. Licenses were issued for only three years, subject to renewal by the Commission, and could be transferred to another party only with its consent. In 1934 the powers and functions of the Federal Radio Commission were transferred to the seven man Federal Communications Commission, but the regulatory system of the 1927 Act was retained.

Congress had specified in the Acts of 1927 and 1934 that the Commission was not to act as a censor and was not to infringe freedom of speech. The drafters of this legislation may have legitimately hoped that this provision would eliminate the spectre of bureaucrats determining or influencing the content of radio communication. The stated purpose of the Act was "to make available so far as possible . . . a rapid, efficient nationwide and worldwide wire and radio communication service. . . ." It has been argued that the act relegated the Commission to the role of a "traffic officer policing the wave lengths to prevent stations from interfering with each other." And as late as 1940 the Supreme Court declared that the broadcasting field was open to anyone showing "competency, the adequacy of his equipment, and financial ability to make good use of assigned channels."

However, no matter how anxious the Commissioners might have been to obey these strictures against censorship, they were faced with a dilemma. In most crucial cases they are confronted with several applicants for a given frequency range, each possessing the necessary technological and financial qualifications. They were forced to make choices on some other basis, and their only legislative guide was the empty "public interest, necessity, or convenience" standard. Inevitably the Commissioners turned to the only other really important criterion, and decisions were made, either directly or indirectly, on the basis of prospective program content (or past program content when passing on renewal applications). This was approved by the Supreme Court in 1943, when Justice Frankfurter correctly pointed out that the rationing function delegated by Congress necessarily involved passing on the *quality* of programming.[5]

THE COMMISSION IS not immune to the most spectacular method used from time immemorial by bureaucrats when called on to award exclusive rights, as was demonstrated by the Commissioner Mack bribery scandal. And it is notoriously guilty of the sin of arbitrariness, which we find associated with almost any allocation process where political replaces market allocation. According to Professor Louis Jaffe of the Harvard Law School, the Commission's announced criteria for awarding licenses were "spurious criteria used to justify results otherwise arrived at." They were "announced only to be ignored, ingeniously explained away, or so occasionally applied that their very application seems a mockery of justice."[6] The process of awarding

[4] Both these corollaries are echoed today by Chairman Minow in his famous Wasteland Speech before the National Association of Broadcasters: "Your license lets you use the public's airwaves as Trustees for 180,000,000 Americans. The public is your beneficiary. If you want to stay on as Trustees, you must deliver a decent return to the public—not only to your stockholders." "For every hour that the people give you—you owe them something. I intend to see that your debt is paid with service." *Vital Speeches*, June 15, 1961, p. 533, 535.

[5] "The Commission's licensing function cannot be discharged, therefore, merely by finding that there are no technological objections to the granting of a license. If the criterion of 'public interest' were limited to such matters, how could the Commission choose between two applicants for the same facilities, each of whom is financially and technically qualified to operate a station? Since the very inception of federal regulation of radio, comparative considerations as to services to be rendered have governed the application of the standard of 'public interest, necessity or convenience.' " National Broadcasting Co. v. U.S., 319 U.S. 190, 217 (1943).

[6] "The Scandal in TV Licensing," *Harper's Magazine*, September, 1957, p. 79, 84.

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licenses is characterized by inconsistency, uncertainty, fantastic delay, and favoritism, placing a serious barrier in the way of managers attempting to make rational business calculations. But these are problems which we can expect to crop up with any regulatory bureau. The FCC presents a special problem because its present procedure brings it into direct conflict with the constitutional guarantee of free speech and free press, and it is to this issue that I address the bulk of this article.

The original Act of 1927 prohibited programs containing "obscene, indecent, and profane" language as well as radio lotteries. Enforcement of these provisions has been relatively restrained, although the Commission has sometimes stretched the meaning of these terms. For instance station KVEP of Portland, Oregon, was dropped from the air and a character known as the "Oregon Wildcat" was criminally convicted for broadcasting profane statements, because of his use of the expressions "damn scoundrel," "by God," and "I'll put on the mantle of the Lord and call down the curse of God on you."[7] Such stringent censorship would probably be a violation of the First Amendment if applied to newspapers. The Commission also placed a ban on the popular giveaway shows of the 1940's, arguing that this constituted a lottery. This ban was struck down by the Supreme Court as not within the Commission's legislative mandate.

However the Commission has challenged freedom of speech more directly by determining what is proper or improper editorializing. In its earliest days the Commission closed down stations for personal vendettas and broadcasts which constituted a "disruptive influence." In the first case of this sort, the Federal Radio Commission in 1928 refused to renew the license of WCOT in Providence, Rhode Island, because the owner made "false and defamatory" statements about personal enemies. (This characterization was based on a Commission decision and not on a jury trial for defamation.)

[7] Duncan v. U.S., 48 Fed 2nd 128, 132, 133 (1931).

An amazing case, more for the language of the decision than for the actual holding, was the refusal to renew the license of KTNT, Muscatine, Iowa, where the licensee had pushed his quack cancer cures and attacked the state medical association and other enemies:

> [The medical association's] alleged sins may be at times of public importance, to be called to the attention of the public over the air in *the right minded way*. But this record discloses that Mr. Baker does not do so in any *high minded way*. It shows that he continually and erratically over the air rides a personal hobby [sic], his cancer cure ideas and his likes and dislikes of certain persons and things. Surely his infliction of all this on the listeners is not the proper use of a broadcasting license. Many of his utterances are vulgar, if not indeed indecent. Assuredly they are *not uplifting or entertaining*.
>
> * * *
>
> *Though we may not censor* [!] it is our duty to see that broadcasting licenses do not afford mere personal organs, and also see that a standard of refinement fitting our day and generation is maintained.[8] [italics added]

In 1932 the Commission refused to renew the license of KGEF, operated by the Trinity Methodist Church of Los Angeles, because its minister, Robert Shuler, had engaged in personal vendettas, made guardedly anti-Catholic and anti-Jewish statements and accused judges of personal immorality. The Commission was upheld by the Circuit Court:

> If it be considered that one in possession of a permit to broadcast in interstate commerce may, without let or hindrance from any source, use these facilities reaching out as they do, from one corner of the country to the other, to obstruct the administration of justice, offend the religious susceptibilities of thousands, inspire political distrust and civic discord, or offend youth and innocence by the free use of words suggestive of sexual immorality, and be answerable for slander only at the instance of the one offended, then this great science, instead of a boon, will become a scourge, and the nation a theatre for the display of individual passions and the collision of personal interests.[9]

[8] FCC Docket #967, June 5, 1931, quoted from Coase, op. cit., p. 9.

[9] Trinity Methodist Church, South v. F.R.C., 62 Fed 2nd 850, 852 (1932).

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The Commission and courts demonstrated at this early date that the federal government would supervise the content and standards of radio broadcasters to a degree that would have been immediately rejected as a violation of freedom of press if applied to newspapers. They were willing to pass on what was and was not "the high minded way" and "uplifting and entertaining." The statement that "we may not censor" was obvious doubletalk; the Commission and courts spoke in the language of blatant censorship if the word is to have any meaning.

Cases such as the above, however, were rare; and the holdings themselves were not as extreme as the language used to rationalize them. The most spectacular infringement of free speech was the Mayflower Doctrine of 1940, which prohibited all editorializing by radio stations.

366

> A truly free radio cannot be used to advocate the cause of the licensee. It cannot be used to support the candidacies of his friends. It cannot be devoted to the support of principles he happens to regard most favorably. In brief, the broadcaster cannot be an advocate.[10]

Although this rule was almost unquestionably unconstitutional, it was obeyed without challenge for nine years. In 1949 the rule was implicitly repudiated by the Commission, and the "fairness doctrine" was substituted in its place. When a station allows a given controversial viewpoint to be presented, it must allow an opportunity for the contrary viewpoint to be presented:

> Only when the licensee's discretion in the choice of the particular programs to be broadcast over his facilities is exercised so as to afford a reasonable opportunity for the presentation of all *responsible* positions on matters of *sufficient importance* to be afforded radio time can radio be maintained as a medium of *freedom of speech for the people as a whole.*[11] [italics added]

[10] Mayflower Broadcasting Co., 8 F.C.C. 330, 340 (1940).

[11] Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1250 (1949). The fairness doctrine was devised by the FCC and should not be confused with the "equal time rule," which was written into the 1927 Act and requires stations to give equal time to all political candidates. This rule raises separate problems not dealt with here.

The Commission switched from a position of banning editorials on radio to actively encouraging them. At present an applicant for a license is expected to include time for discussion of public issues on his proposed schedule, and Chairman Minow has castigated broadcasters for neglecting this area. But two aspects of this doctrine need to be examined, for it is potentially more dangerous tnan the absolute ban of the Mayflower Doctrine. This issue is by no means academic, since more than 400 fairness complaints were received by the Commission in 1961, more than double the 1960 number.

First, the expression "freedom of speech" has undergone a transformation as complete as that of the word "liberal." The First Amendment proclaims that "Congress shall make no law abridging freedom of speech or of the press." Freedom of speech has been viewed quite naturally as a negative freedom—the right not to be restrained from expressing oneself. And the Constitution barred only the government from restraining individuals. But the Commission, while admitting that radio came under the First Amendment, proceeded to give the concept an opposite meaning:

> But this does not mean that the *freedom of the people as a whole* to enjoy the maximum possible utilization of this medium of mass communication may be subordinated to the freedom of any single person to exploit the medium for his own private interest. . . . The most significant meaning of freedom of the radio is the right of the American people to listen to this great medium of communcation free from any governmental dictation as to what they can or cannot hear and *free alike from similar restraints of private licensees.* [italics added]

Freedom of speech has become the "right" of "the people as a whole" to receive broadcasts free from "restraints" of those who make the broadcasts; the violators of this freedom are those who decide what they will broadcast according to their "own private interest," and the government is the interpreter and enforcer of this "freedom." This seems an unconscious parody of a recent explanation by Mikoyan as to why the

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Russian press is free and the Western press is not.

A more concrete problem is raised by the assumption that there is an objective standard of fairness. Undoubtedly opinions which would fit into what we might irreverently dub the "Establishment Consensus" will be held entitled to a reply—attacks on the flag, the New Frontier, religion, racial equality, labor unions will almost certainly fall within the fairness doctrine. But what of the hard cases, the less "respectable" opinions, which always constitute the crucial arena when freedom of speech is involved. Would Ross Barnett be entitled to reply to an attack on his position? Harry Bridges? Jimmy Hoffa? The Commission inserted "weasel words" to provide a way out. Only "responsible positions" "on matters of sufficient importance" are entitled to replies. And the government must of course decide what is responsible and of sufficient importance. Hence the Commission must make crucial value judgments to apply its standard.

The record indicates that, in spite of self-righteous denials, the Commission has done just this. Labor unions and cooperatives have received Commission help when stations were charged with anti-labor or anti-cooperative bias,[12] as have various other groups representing what we view as responsible opinions. But an atheist named Robert Scott did not fare so well in an attempt to reply to direct attacks on the atheist position. An initial decision in 1946 denied Scott's request for revocation of the licenses of stations that refused to give him time, but the Commission indicated that atheistic views were controversial and might be entitled to a hearing.[13] This dictum provoked the expected furor on Capitol Hill, complete with a committee investigation. Here was one of those great issues of righteousness which so obsess the souls of Congressmen and allow them to sound off to the constituency without antagonizing any sizeable group.[14] As a result the Commission backed off, and in a later challenge by Scott refused him even a hearing. More recently the NBC documentary, "Battle of Newburgh," which this writer and many conservative commentators felt was a grossly biased report of a domestic controversy, was given a clean bill of health by the Commission. In response to a fairness complaint by City Manager Mitchell, the Commissioners hailed it as a "conscientious and responsible effort to report a controversial issue."[15] While we may be as opinionated as the Commission here, the tragedy is that the Commissioners are able and willing to base their decisions on such opinion in a matter where reasonable men can obviously disagree.

It seems obvious that a "fairness doctrine" is not likely to be applied fairly, not only because there can be no objective criteria for applying it, but also because a politically sensitive agency will almost certainly be unwilling or unable to apply it symmetrically. (A symmetrical application would mean that if advocates of opinion B could be challenged by advocates of opinion A, then advocates of opinion B could challenge advocates of opinion A.) And in the hands of Commissioners who are not well intentioned, this would become a potent weapon for control of our nation's thought. The possibilities are indicated by recent urgings that the Commission should investigate southern stations that did not give a fair hearing to President Kennedy's position in the Mississippi integration crisis.

A related problem is raised by the "good character" requirement for licensees. An applicant is required by the Commission to show that he is "of good character and possesses other qualifications sufficient to provide a satisfactory public service." Under this regulation the Commission has denied licenses to appli-

[12] Smead, *Freedom of Speech by Radio and Television* (Washington, D.C.: Public Affairs Press, 1959), p. 50 *et. seq.*, and Wilcox, *op. cit.*, p. 713.

[13] In re Petition of Robert Scott (FCC release 96050) July 19, 1946, quoted in Smead, *ibid*, p. 61.

[14] Representative Charles J. Kersten demonstrated typical Congressional tolerance: "Atheists have no more standing to ask equal time with religious programs over the air than violators of the moral law would have the right to expound immoral ideas on an equal basis with time granted to those who defended the moral law." Quoted from Smead, *op. cit.*, p. 62.

[15] *New York Times*, August 12, 1962.

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cants who make false statements on their application forms and who have been convicted of crimes.[16]

The Commission is on much weaker ground when it attempts to ascertain the character of applicants by examining their opinions and associations.[17] When the New York *Daily News* applied in 1942 for an FM station, the American Jewish Congress intervened, arguing that the newspaper's alleged editorial bias against Jews and Negroes had disqualified it as a radio operator. The Commission allowed this evidence to be admitted to help it determine "whether [the applicant] is likely to give a fair break to those who do not share [these beliefs]."[18] According to the Commission this evidence was relevant to the "character" of the applicant and was not used to determine his beliefs. (If the Commission were sincere and not really interested in specific beliefs, consistency would require it to admit evidence of an anti-racist bias as relevant to the question of the applicant's willingness to give racists a fair break. This hardly seems likely.) The evidence submitted was dismissed by the Commission as being unscientifically prepared and thus having no probative value. The license was denied, allegedly on other grounds, and it is impossible to determine what actual effect the evidence had.

In a later case a clergyman was denied a license because he was found to be "intemperate in his writings, sermons and broadcasts . . . an expert in vituperation and vilification." However the Commission recognizes some limits. When a rival applicant attacked the application of WHDH because Al Capp was a minority shareholder and his comic strip "Li'l Abner" had allegedly been condemned by a New York legislative committee, the Commission dismissed the argument, stating with a straight face that Capp was obviously not in control of WHDH.

Inevitably the alleged Communist or pro-Communist connections of applicants have become involved in license controversies. Applicants have been rejected for refusal to disclose whether they were members of the Communist party. The case of Edward Lamb, a founder of the far left National Lawyers' Guild, raised one of the greatest rows in Commission history. In 1954, when Lamb applied for license renewal for his station WICU, a pioneer television station, the Commission charged that he had lied during hearings for his license in 1948. He had not told of alleged Communist affiliations and associations and had not mentioned a pro-Russian book he had written in 1935 (the book would seem to have been a matter of public record). During lengthy and well-publicized hearings two Commission witnesses recanted and accused Commission representatives of urging them to lie under oath. (One of these witnesses, however, was later convicted of libeling a Commission staff member with these charges.) The hearing examiner found no evidence that Lamb had engaged in Communist activity, and the license was eventually renewed.

This is an incomplete catalog of some of the more dramatic absurdities of Commission activity up through the last two years. It should be noted that these cases were exceptions rather than the rule, and the language of the decisions and rulings was usually much worse than the actual holdings. The Commissioners usually exhibited a healthy desire not to force their tastes, prejudices and views on broadcasters and the public. Its most potent weapon of coercion, the threat not to renew a license, was used so sparingly that the Commission earned from certain leftist quarters the *ne plus ultra* of insulting epithets: *laissez-faire*. However, during this period a philosophy of special responsibilities on the part of broadcasters and of a duty to supervise and control on the part of the Commission had become

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[16] The Commission recently held up a renewal for a General Electric station because of the anti-trust suit against G.E. *Wall Street Journal*, June 16, 1961. After heated hearings, J. S. Love was granted a license in Mississippi even though he openly ignored the state's prohibition law as a hotel keeper, a law which was such a dead letter that the state also taxed the sale of liquor. Brown, *infra*, n. 17, p. 647.

[17] The cases mentioned here are discussed at greater length in an article by Prof. Ralph S. Brown, "Character and Candor Requirements for FCC Licensees," *Law and Contemporary Problems*, Autumn, 1957, p. 644 *et. seq.*

[18] WBNX Broadcasting Co., 12 F.C.C. 805 (1948).

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so well established that the stage was set for a Caesar who would not view his role with such self restraint.

THIS POTENTIALITY for abuse inherent in our public philosophy of radio and television regulation has unfortunately taken on a magnified importance since the arrival of the New Frontier and Newton Minow in Washington. Since his famous "Wasteland" speech in May of 1961, Minow has embarked upon the imposing task of forcing stations and networks to fulfill their alleged trust obligation to the American public. Broadcasters are constantly exhorted to act in the "public interest," which he treats as an entity as ascertainable as the specific gravity of lead. Much of his crusade thus far consists of verbiage which can be dismissed with a condescending smile usually reserved for overly enthusiastic cheerleaders: "Never have so few [the broadcasters] owed so much to so many [the public]." "Gentlemen, your trust accounting with your beneficiaries is overdue." And of course: "Ask not what broadcasting can do for you. Ask what you can do for broadcasting."[19]

But other remarks and actions cannot be dismissed so easily. He has coupled his warnings that programming standards must be improved with explicit threats not to renew licenses if this is not done. He assures us that no censorship is planned:

> I am unalterably opposed to governmental censorship. There will be no suppression of programming which does not meet with bureaucratic tastes. Censorship strikes at the tap root of our free society.

It might seem that a decision as to what is or is not improved programming involves a value judgment on the part of the Commission, involves what we would call censorship and the application of bureaucratic tastes. But we misunderstand the meaning of censorship, and Minow sets us straight on this. The Commission does not censor, since the courts have upheld its authority to concern itself with a licensee's programming. Rather it is the *broadcasters* who censor. This censorship takes two insidious forms, "rating censorship" and "dollar censorship." Rating censorship

> *. . . is a result of the almost desperate compulsion of some licensees to live by the numbers, always striving to reach the largest possible audience in order to attract and hold the mass advertising dollars.*[20]

In other words censorship occurs when broadcasters give the listeners what they want! Dollar censorship occurs when a broadcaster lets his advertiser—the party footing the bill—determine what will be shown.

But even if we are overawed by Minow's rhetoric and concede that only broadcasters indulge in "censorship" under the New Frontier redefinition, certain dilemmas remain which cannot be avoided by facile cliches about "public interest" and "the people's airwaves."[21] Clearly the broadcasters and networks are not presenting the type of programs Minow and his cohorts expect (in this they are supported by the most vocal segments of national opinion), and he intends to bring about a change. His objection is not that the broadcasters are failing to give the public what it wants but precisely that they are giving the public what it wants but not what it "needs." "Some say the public interest is what interests the public. I disagree. . . . It is not enough to cater to the public whims —you must also serve the nation's needs." To implement this program there is no alternative to substitution of "bureaucratic tastes," so strongly eschewed by Minow, for the tastes of the marketplace as indicated by the ratings. This raises a more fundamental conflict for a free, pluralistic, and ostensibly consumer-

[19] The Wasteland Speech again. *Vital Speeches*, June 15, 1961, p. 533, 534, 537.

[20] *Wall Street Journal*, August 4, 1962.

[21] A typical example of Minow doubletalk: "[We do not] contemplate any invasion by the Commission of the programming function of the broadcasters. However, we are equally determined that every broadcaster to whom we issue a license shall make an honest, sincere effort to serve the public interest." *Wall Street Journal*, January 24, 1962.

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oriented society than even control of editorials under the "fairness" doctrine. The logical extension of this elitist desire to use government to subordinate popular tastes in favor of more "edifying" ones can be seen in England, where the government's Pilkington Report advocates placing commercial television under government control (even though now it is run by government-appointed trustees) precisely because it is drawing viewers away from the more uplifting BBC programs and forcing the BBC to lower its standards to compete.[22]

I would not claim that the present mediocrity in television does not present a problem, and it is possible that Minow's non-coercive attempts at moral suasion may in some cases have a desirable effect. I will deal with this problem more thoroughly below. But first we need to examine some of his specific responses to the problem.

First, he holds that there is no problem of censorship or invasion of the broadcaster's programming function if the Commission cracks down on overall program balance rather than on individual programs. "I told the Senate committee that if someone puts on a lousy Western it's none of the Government's business—but if someone puts on nothing else for three weeks, then it is." (He will of course find no station which shows nothing but Westerns; he obviously refers to "too many Westerns"—in somebody's judgment.) Before his appointment the Commission had established a policy of viewing overall program balance as a major criterion for granting and renewing licenses,[23] although few renewals were denied for not complying with promises. He has announced that he will vigorously enforce this policy, especially by denying renewals. Of course any judgment as to what constitutes a balanced schedule—or which of two competing schedules is more balanced—must involve some standard of taste or value just as much as passing on the worth of an individual program.

Second, Minow continually refers to another pseudo-objective standard which he would have us believe would not involve bureaucratic value judgments. Broadcasters must meet "local needs," and these needs are to be ascertained by calling in local groups before Commission hearings.

> Renewal hearings should be held in the local community. Let anybody come and say what kind of programs the local stations have been showing. League of Women Voters, P.T.A., Church groups, everybody. I think that pretty quickly you'd have better television programming. I don't think people realize they own the air, and the broadcaster is using it with their permission.[24]

Recently a license was denied Suburban Broadcasters in Elizabeth, New Jersey, specifically because the applicant "made no attempt to determine the program needs of Elizabeth."

While this policy might appear to some to express an admirable "democratic" sentiment, he never specifies precisely what is meant by local needs. But we can get a good idea of the emphasis it is likely to take by looking at the recent Commission hearings in Chicago which were held to determine such local needs. The Radio and TV director of the Catholic Archdiocese complained that the shows *given free of charge* to the

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[22] *New York Times*, June 28, 1962. Fortunately several Tory government spokesmen have indicated their disapproval of the report.

[23] In a pre-Minow statement, "Network Programming Inquiry Report and Statement of Policy," 25 Federal Regulations 7291 (1961), the Commission, Commissioner Hyde dissenting, laid down the following categories as essential to a balanced schedule: (1) Opportunity for local self expression, (2) Development and use of local talents, (3) Programs for children, (4) *Religious programs* (possible constitutional question?), (5) Educational programs, (6) Public affairs programs, (7) *Editorialization by licensees* (remember the fairness rule), (8) Political broadcasts, (9) Agricultural programs, (10) News programs, (11) Weather and market reports, (12) Sports programs, (13) Service to minority groups, (14) Entertainment programming. (p. 7295) There is a strong indication that all these must be included in a successful application prospectus; cf. *Nebraska Law Review*, June, 1962, p. 826. And failure to carry out the program set forth in the prospectus is sufficient grounds for refusal to renew a license.

[24] "The Big Squeeze," *Saturday Evening Post*, November 11, 1961, p. 62.

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Archdiocese were produced in "the smallest and most inadequate studio in Chicago" and charged the stations with a "lack of concern" for religious programming. The head of the Broadcasting Commission of the Chicago Board of Rabbis complained that religious programs are scheduled for Sunday morning, when TV sets are allegedly not in use. The publisher of the Chicago *Daily Defender* complained that "generally the Negro as a normal human being doesn't exist in the programming eye of the local TV stations." He reported that there had been some improvement, but the stations still "haven't come around to our satisfaction." The President of the Joint Civic Committee of Italian-Americans found a number of programs, such as "The Untouchables," portraying "persons of Italian extraction as gangsters." And the Chairman of the Japanese-American Citizens League complained of anti-Japanese World War II movies on late shows.[25]

One important reason for television's mediocrity has been the fear of offending minority and special interest groups. Making a politically sensitive government bureau a champion of "local interests" certainly would not work in the other direction. The "public" which makes itself heard at government hearings is invariably composed of the best organized interest groups. This is a variety of democracy that is all too prevalent today.

Third, Minow sees TV's programming "wasteland" as largely due to sordid attempts by advertisers and broadcasters to maximize profits. He notes with indignation that far too many broadcasters operate "not in the public interest but rather to get the greatest financial return possible out of their investment." He somehow hopes to improve radio and television fare with various restrictions on advertisers which will inevitably make sponsorship less attractive to them, including proposals to prevent any control by advertisers of the programs they sponsor and to place severe limits on the length and content of commercials. While a more "uplifting" television program is not necessarily a more costly one, a policy which is designed to make sponsorship less attractive to advertisers would seem to be the worst way to entice them into improving their programs. A more plausible effect would be to cause advertisers to shift their advertising dollars out of radio and television and into media where the return is higher. His policy becomes all the more incomprehensible when we consider that he wishes to apply the more stringent advertising controls to radio, where he asserts that earnings are "too low," and where he is looking for methods of raising earnings. Following the regulatory tradition of the CAB and ICC, he has suggested that radio is "too competitive," and that earnings might be increased by making it less competitive—i.e., by encouraging concentration.

Thus far Minow has met with opposition to his policies on the Commission itself; he has seldom been able to obtain a majority to support his promises to use revocation and refusals to renew licenses to enforce his ideas of proper programming. Commissioners Rosel Hyde and John Cross have publicly criticized his regulation mania, and Hyde has warned that, "The unattractive office of censor can be made to appear as guardian of integrity." But in December of 1962 President Kennedy, an avid supporter of Minow's policies, appointed Kenneth Cox, a Minow partisan, to replace the retiring Cross. And in 1965, assuming the New Frontier goes rolling on, we can count on an absolute majority of Minow men.

Thus the near future may bring the full fruits of our nation's acquiescence in broadcasting control. The likelihood that many renewal applications will be denied takes on special significance. As was mentioned earlier, during its entire

[25] *Wall Street Journal*, March 20, 1962, and March 22, 1962. Minow places great store by such complaints: "We received substantial complaints from the three major religious faiths and other citizens requesting a chance to comment on local service [in Chicago]. I say to you frankly and positively: we will not ignore such complaints and neither should you." *New York Times*, April 4, 1962.

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history the Commission had acted with restraint in this matter. But in 1961, the first year of the Minow dispensation, 588 applications for renewal were deferred for investigation, many times more than the total for any previous year. And the Commission's refusal to renew the license of WDKD in Kingstree, South Carolina, for "coarse, vulgar, suggestive, indecent, double meaning statements" of a disc jockey as well as for alleged "overcommercialization," has been interpreted as marking a reversal of previous leniency on renewals.[26]

The Commission's past restraint in the matter of renewals has been a most effective check on bureaucratic control of our radio and television fare. The administrative bureau offers a tremendous opportunity for coercion to satisfy the whims and prejudices of the bureaucrats in control, since a bogus basis can be found for almost any decision (and decisions are essentially non-reviewable on the facts by higher courts). But the greatest danger will not be in the actual use of this power, but rather in the fear that it might be used. When we consider Professor Jaffe's observation that announced criteria are largely ignored by the Commission and that the licensing process is characterized by marked arbitrariness and uncertainty, we can be certain that similar uncertainty about the likelihood of obtaining a renewal every three years could wreak havoc with attempts by managers to make rational business calculations about the future.

And what of the effects on freedom of expression? Witness the Mayflower Decision, which, though obviously unconstitutional, was obeyed for nine years without challenge. If significant numbers of licenses are revoked or not renewed, no one can be certain of the real reasons. Even if objective and high sounding criteria are offered, who will risk offending the New Frontier editorially before renewal time? Who will risk defying the opinions and prejudices which Commissioners express off the record? Broadcasters devote exhaustive effort to determining "public whims;" it would seem even more urgent to them to guess at and satisfy the whims of the Commissioners, who hold the power of life or death over their business every three years.

WITH THESE DISTURBING problems raised by government regulation, why do we single out radio and television for a comprehensive and in some ways unique form of regulation, one that we would not allow for a moment with newspapers or public speeches? There is of course the fear of monopoly concentration because of scarcity of airspace and consequent difficulty of entry into the industry. Such a danger might well exist; but we have an elaborate structure of antitrust laws, and these have been frequently applied to the broadcasting field. From a strictly economic perspective imperfect competition in radio and television presents the same problems which in other industries we have been content to leave to the antitrust laws.

But there are other more important difficulties which allegedly distinguish radio and television from newspapers and movies. Radio and especially television are more accessible to children than printed matter; hence it is argued that immorality, violence, and other subject matter which might have a bad effect on children should be more strictly controlled. This argument is in the writer's opinion the only one which might support greater program control of airwaves than of newspapers. The difference, however, is one of degree and not of kind; objectionable printed matter, as well as television pictures, can find its way into the home. And in a free society the duty of censorship of material likely to influence children should rest primarily with the parent.

It is also persuasively argued that anyone can start a newspaper, but only a limited and privileged number can oper-

[26] "An End to Laissez Faire?" *Saturday Review*, March 24, 1962, p. 35, and *New York Times*, July 26, 1962. The hearing examiner in the case stated that a Commission decision to uphold him would "help signalize abandonment by the Commission of a laissez faire policy of regulation in the field of programming."

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ate a television station. Hence, aside from the danger of monopoly profits, this most important channel for the dissemination of ideas is not really open to the "marketplace of ideas," as is the newspaper business. Any point of view can allegedly find expression in the newspaper world, but radio and especially television are controlled by those who were fortunate enough to get a special privilege. This argument has only a grain of truth. In the first place radio and television stations must compete with newspapers in the marketplace as well as with other stations, and there is no persuasive evidence that stations have generally been more effective proponents than newspapers. Even more important, our fifty largest cities have an average of from three to four television stations but only two newspapers.[27] Just as there are technological limitations on the number of radio and television stations in a geographic area, a community will only be capable of supporting financially a small number of newspapers. A few persons will control each medium in any community. The argument is valid only insofar as anyone with sufficient capital can attempt to found a newspaper but cannot found a broadcasting station without a government grant.

Two factors do seem to differentiate broadcasting from other communications media and need to be dealt with at greater length. In both cases I suggest that we should consider possible market solutions utilizing the price mechanism.

The first problem (which I must deal with in a somewhat oversimplified fashion) arises from the fact that broadcasting is financed by advertising rather than by direct payments from its audience. Consequently, voting by viewers cannot be "weighted" as it is in other areas. By this I mean that, if a given minority wants a better magazine or a better car enough to pay more for it, it will be produced if the higher price they are willing to pay will make production profitable. But there is no analogous way for television viewers to weight their vote. Though John Doe might be willing to pay $5.00 to see one show and little or nothing to see another show that he watches, this cannot be recorded by the market. Consequently, it can be said with only minor qualifications that the sponsor is interested only in paying for a show that, for a given cost, will reach the largest possible audience.[28] Hence our radio and television fare tends to be pitched to the lowest common denominator, and minority tastes will often be unsatisfied.

This has been a major reason for Minow's acclaim among vocal segments of American opinion for his demands that our television wasteland be renovated. One can debate whether it is necessarily undesirable to have a low-brow communications medium. But if we fell that at least a portion of our television fare should be devoted to what we consider higher quality material, pay television offers one solution to this problem. A minority, no matter how small, could make it advantageous to produce a given type of show merely by being willing to pay enough to make it profitable. The Commission has moved hesitatingly in the right direction by allowing tests of pay television in Hartford and Denver, after much delay due largely to Congressional pressure. The amazing aspect is that this can be done only under close Commission supervision and that the Commission's *power to grant permission* could be seriously challenged in the courts by associations of theatre owners and broadcasters with the argument that they would be deprived of business. Another possibility is the increased use of closed circuit pay television, which is not under FCC jurisdiction and does not

[27] *Nebraska Law Review*, June, 1962, p. 824.

[28] Even when attempting to attract the largest audience, an advertiser will often cater to minority tastes: an historical documentary might receive a higher numerical rating than a western because there are so many westerns competing for those who prefer westerns to historical documentaries. And an advertiser may prefer a select audience even if smaller; farm appliance dealers would cater to farmers and soap manufacturers to housewives. In a few cases advertisers are concerned with the "stamp of quality" for their product which they hope will be derived from a high quality show. The "Hallmark Hall of Fame" is a good example.

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interfere with open circuit stations on the same frequencies, although there are serious technological problems in establishing a profitable system of this sort.

Pay television raises certain problems that space does not permit me to deal with here. But if we feel that television standards must be improved, the alternative to pay TV seems to be a bureaucratic determination as to what is necessary to elevate and educate the American citizenry.

The second and more crucial problem was alluded to above: how can available frequencies be allocated so as to avoid the pitfalls outlined above? A startling but plausible suggestion (and one that I have not too subtly hinted at throughout the article) is that we view the available frequencies as another scarce resource and examine alternative methods by which the impersonal market might ration this resource.

The homesteading principle was one method of allocating land, and this principle was actually applied by some courts to radio before the Act of 1927.[29] In these cases the station first to put equipment into use which used certain frequencies received a property right in these frequencies, that is, a right to use these frequencies without interference from other operators. The courts used the analogy of the homesteader who obtained ownership of the land that he put to use first. Many problems, such as the limits of the geographic area covered by this property right and the control of interference, would be left to the courts to decide. But the courts have successfully faced analogous problems in property law before and they were developing such a body of law when Congress intervened in 1927.

Professor R. H. Coase of the University of Virginia presents a more radical but probably more acceptable plan: *he suggests that property rights in available frequencies be auctioned by the government to the highest bidder.*[30] He presents a lengthy and convincing case for a market allocation of available frequencies, and I can only give a brief outline of his position here. The successful bidder would be free to sell, lease, or otherwise contract for the use of these frequencies and would be entitled to government protection against interference in his allocated frequency range, just as a property owner is entitled to government protection against interference with the use of his property.

By this device the price system rather than the bureaucratic process would allocate the airwaves just as it allocates other fixed factors of production such as land and labor: available airspace would go to those who would use it most profitably. And the argument for allocation of land, labor, and minerals, to those who could use them most profitably would apply here. To state it a bit crudely, the most profitable use is the one, among all competing uses, which is valued most highly by consumers.[31]

Broadcasting would consequently be placed on a basis similar to newspapers. Both would purchase all their factors of production on the market, and each community would support only a few of each, selection being made by the largely impersonal market mechanism. The strongest arguments for the "trustee" role of broadcasters would disappear. Not only would the people no longer "own" the airwaves, but the licensee would no longer receive from the state a free grant, often worth large sums of money, from which special duties to the public could be reasonably inferred. Elimination of huge windfalls which accrue to successful licensees would be one advantage to this plan. At present stations sell for as much as $20 million, and a sizeable portion of this is for the mere license.

This plan has been naively dismissed by some on the grounds that it would

[29] Cf. Tribune Co. v. Oak Leaves Broadcasting Station (Cir. Ct., Cook County, Ill., 1926), cited in Coase, op. *cit.*, p. 31. The operator of a station was held to have established a sufficient property right, acquired by priority, to bar a later established station from causing any interference.

[30] Op. *cit.*, n. 2.

[31] In the case of non-pay TV and radio, the direct consumers are advertisers rather than the audience, and the problems brought about by the inability of listeners to weight their votes would still exist if airspace was auctioned.

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award stations to those with the most money. Actually, the price mechanism allocates resources to those who can put them to the most profitable use; and, assuming a fluid capital market, this will only coincidentally be the party possessing the most money. On the other hand, the Commission has in fact tended to favor large, financially prosperous and experienced firms; it is certainly not implausible that newer and smaller firms would obtain more stations under an auctioning system.

In addition to eliminating the need for regulation of program content with its dangers for freedom of speech and press, use of the market mechanism would eliminate other problems inherent in centralized decision-making. Program broadcasting occupies a relatively small portion of available frequencies, the rest being allocated to various private users—oil companies, taxis, telephone companies, etc.—and to governmental users—military, forest services, etc. The Commission, which is overworked and operating on a tiny budget, has been forced to arbitrarily assign ranges of frequencies to various categories of use. Consequently the Commission often rations available broadcasting frequencies among eager applicants while equally serviceable frequencies go unused. An auctioning system would ration out all available frequencies among all possible uses according to the relative monetary returns to various uses, as reflected in the bids.

These seem like strange and radical proposals largely because we have grown to look at broadcasting in a way which is not warranted by the facts. As Professor Coase states it: "It is difficult to avoid the conclusion that the widespread opposition to the use of the pricing system for the allocation of frequencies can be explained only by the fact that the possibility of using it has never been seriously faced."

There would of course be serious problems in implementing such a system today; since expectations have been built around the present system, it would be more difficult to convert to a pricing system today than to implement it in the 1920's. Alternative measures might be explored which would invoke some of the benefits of the market and reduce the role of government. If sale of frequencies for all time to the highest bidder were unacceptable, the government might lease the frequencies to the highest bidder for a period of years, with the lessee having the right to freely sublease or otherwise use the frequencies as he saw fit. If we feel that it would be unfair to require existing stations, who have invested large amounts in the expectation of continued free use of their frequencies, to either bid high or lose their frequencies, we might restrict bidding to presently unused frequencies. The price mechanism would prevail to a large extent even under the present system if licensees were free to sell or otherwise dispose of their frequencies to anyone without Commission approval and if renewals were made automatic.[32]

The suggestions advanced above are offered with some trepidation; there are many difficulties which space does not permit me to deal with here. But we should at least explore them more thoroughly, for the alternative is abdication to the present system, which not only has operated unsatisfactorily in the past but is showing portents for the future that a free society cannot accept.

[32] Full utilization of ultra high frequencies, which can be expected in the future, will more than double the number of television stations and will consequently lessen the need for rigorous rationing. It is possible that there will be airspace available in many areas for more stations than the area will support economically. At present UHF is not fully utilized, largely because most television sets are not equipped to receive it (although in other ways UHF is inferior to VHF). FM broadcasting was slow in becoming established for the same reason, and market pressures will undoubtedly increase the use of UHF just as it did FM. This process will be accelerated by the recent law which requires television manufacturers to adapt all sets to UHF.

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Czecho-Slovakia and the USSR

OTTO VON HABSBURG

IT IS CUSTOMARY in the Free World to consider the so-called satellite countries as having more or less identical standing within the Warsaw Pact system. This is a fallacy. In fact, there are basic differences from Moscow's point of view.

The history of the last fourteen years proves that Eastern Europe is not the monolithic bloc that Khrushchev pretends it is. In two states, the population has shown, not only its overwhelming hostility against Communism and foreign rule, but also its readiness to make the supreme sacrifice in a desperate attempt to overthrow the tyranny. In Hungary, at least nine-tenths of the nation rose against colonial oppression in October, 1956. Khrushchev needed 21 armored divisions and protracted heavy artillery fire on the centers of resistance, especially Budapest, to impose the puppet regime of Janos Kadar on the vanquished country. The strength of continued opposition despite military defeat is shown by Kadar's repeated purges and obvious efforts to placate the nation.

In the Soviet-occupied zone of Germany, the so-called "German Democratic Republic," the oppressed population and especially the factory-workers of East Berlin and of the industrial areas of Halle and Leipzig, rose on June 17, 1953, and for several days fought valiantly against dictator Ulbricht's police. Here, too, the Russian army had to step in, in order to keep the Communists in power.

In Poland we have had strikes and other acts of resistance in 1956, even before the Hungarian uprising. After Budapest fell to the Russians, the situation remained extremely critical for two months. Finally, a *de facto* compromise was reached: the Polish people represented primarily by the Catholic bishops, led by Archbishop Cardinal Wyszinsky, renounced — in the light of what had happened in Hungary — the use of violence, in exchange for an easing of the Soviet pressure and the elimination of the so-called Natolin-Stalinist group. The Soviets, on the other hand, recognized that a war in Poland would entail more dangers for them than the one in Hungary, since Poland has a mighty army and direct access to the sea, where it could receive arms and equipment from the West via the ports of Stettin and Danzig. Poland has thus obtained up to this day a special position in the Eastern Bloc. True, Gomulka is not a democrat, as certain Western observers would like to believe. Still, there are areas of freedom in Poland which Moscow tacitly accepts in both cultural and economic life, especially agriculture.

Compared to these developments, it is surprising that since 1948 only Czecho-Slovakia among the central European satellites has accepted without serious resistance both Soviet hegemony and the integrally Communist policies of its gov-

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ernments. In all that period only the liquidation of the Slansky group might be regarded as an attempt at liberalization, since the eleven Communist leaders hanged had been the most important liaison men between the Czech government and the Soviet Union. Even after the 20th Party Congress all remained quiet in this model Communist Republic. Never did Stalin or Khrushchev feel the need to intervene in Prague.

Slovakia is the only area in Czecho-Slovakia where major security measures have been called for. This shows an essential difference within the nation, which has deep historic roots.

The overwhelming majority in Slovakia has always opposed the fiction of the Czecho-Slovak nation. During the First World War, the leader of the Czech emigration and later head of the Czecho-Slovak Provisional Government, Thomas G. Masaryk, pledged to the American Slovaks in the Treaty of Pittsburgh that, in exchange for their political support, full autonomy would be given to their country, including an independent Parliament and administration. This agreement was never honored by the Czechs, despite strong Slovak protests. Masaryk later stated that he had only meant to make a non-committal declaration. To prove that this was not true, a delegation of American Slovaks brought the original document from Pittsburgh to Europe in 1938. The Slovaks, led by Mr. Hletko, entered their country through Poland and, at great popular gatherings, exhibited the signature of Masaryk. The energetic demands of the Slovaks for the fulfillment of the treaty contributed decisively to the collapse of President Benes' regime in the summer of 1938.

The Slovaks considered themselves a separate nationality not "Czecho-Slovaks." The same can be said of the Czechs, who never call themselves "Czecho-Slovaks." The Slovak, Hodza, who was Prime Minister at the hour of the great crisis in 1938, went one step further and spoke of "Czechs, Moravians and Slovaks," thus showing that he considered even the Slavs of Moravia as a nation. There is a Slovak language. Even the casual traveler will see it while reading public inscriptions. In the trains, compartments where smoking is forbidden are marked in Czech territories *Nekuraci,* while in Slovakia it is *Nefajfarov.* The difference between Czech and Slovak is approximately the same as between Slovene and Croat, Danish and Norwegian, or Dutch and German. Furthermore, the predominantly rural population of Slovakia is deeply religious and consequently resented the laicistic cultural policy pursued by the Czechs from 1918-1919 on.

The Slovak question turned out to be the fatal handicap of the Second Czecho-Slovak Republic from October, 1938, to March, 1939. The hyphen between the two parts of the State's name was obtained by the Slovaks immediately after the Munich agreement. They also received a far-reaching autonomy with independent Diet and ministries. But new conflicts soon arose. When the central authority violated the constitution by removing the autonomous Slovak government, German diplomacy had no great trouble encouraging the Slovaks in their demand for a complete break with Prague. On March 13, 1939, the independent Slovak Republic was proclaimed in Bratislava. This was the cause of President Hacha's ill-fated trip to Berlin.

The Slovaks, in whose make-up we find many Magyar and Polish elements, are much more temperamental than the Czechs. During the Second World War they rose in the autumn of 1944 against the Nazi occupier, while the Czech territories, the Protectorate, remained cooperative and quiet. The so-called Prague uprising of May 5, 1945, took place only because a false rumor had spread that American combat units had already entered the town. On the morning of May 9, the Red Army entered Prague and thus secured the victory of the Communists.

In Slovakia, resistance against Communism was much stronger than in the Czech areas despite the fact that the Communists at first recognized Slovak autonomy and abandoned the fiction of "Czechoslovak" by including the hyphenated version of the word in the constitution. It is practically unknown in the

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Free World that in the 1946 elections, the last which were relatively free, only the Slovaks gave a clear and sizeable majority against the Communists; this was not the case for the historically Czech provinces of Bohemia, Moravia and Silesia. In May, 1946, 61.4% of the Slovak voters supported the strongly anti-Communist Slovak Democratic Party. While Communist votes amounted to 38% in the whole nation, Communist returns in the Czech territories exceeded 40%. The Socialist Party, led by Zedenek Fierlinger, closely allied with the Communists, received 12.8% of the total, almost exclusively from Czech areas. Thus the Communists and their satellites had, from 1946 on, a 50.8% majority in the State. Without the massive anti-Communist votes of the Slovaks this majority would have been much greater.

Had the Czechs voted in 1946 as did the Slovaks it might have been possible to form in Prague a government without Communists, or at least a cabinet in which the Communists would not have held the top positions such as the Presidency of the Council, the Ministry of Interior (with its control over the police), or the Ministries of Propaganda, Agriculture, Education and Culture. An "Austrian solution" would have been possible.

A realistic appraisal leads thus to the conclusion that, contrary to the Poles, the Hungarians and the East Germans, a majority of the Czechs gave in to the left wing totalitarians and dragged the unwilling Slovaks along with them into the catastrophe. Only 15.8% of the Czech voters gave their ballots in May, 1946, to the only party which presented a true alternative to the Communists, namely the Christian Lidova Strana, whose press had the courage in the years 1945-46 to expose the crimes of the Communists and to warn of their gradual take-over of the State. Especially the columnist Helena Kozeluhova, who later was able to escape to the West, spoke out with great courage and raised the hopes that her party might become a strong rallying point.

The Social Democrats were, as we mentioned, satellites of the Communists. It is true that in the year 1947, when the Social Democratic youth became restless, Fierlinger was removed as head of the party and replaced by Bohumil Lausman. Nevertheless, in 1948 Lausman was the first to recognize the new order demanded by the Communists and sanctioned by President Benes. Later on Lausman escaped to the West but very soon returned to Czecho-Slovakia and made his peace with the Gottwald-Fierlinger regime. There are good reasons to believe that he did not come to the West as a bona fide emigrant but as an agent sent to carry out propaganda actions in favor of the Communists.

Concerning the present-day situation in the country, one has to be most skeptical regarding alleged secret information coming from emigre political groups. There is no tangible evidence of an effective underground movement. Escapees and prisoners who were used as forced labor in the coal pits, stone quarries and uranium mines, and thus had the opportunity to speak with Czech co-workers or prisoners, report unanimously that there unquestionably is dissatisfaction in the country, but that real resistance can only be found in Slovakia.

This surprising attitude of the Czechs has its roots in three reasons which the West scarcely knows:

(1) the expulsion of the German population from the Czecho-Slovak Republic prepared systematically by Dr. Benes since 1939;

(2) Benes' consistent policy of close alignment of his country with the Soviet Union; and

(3) the bloody so-called revolution organized by Dr. Benes after the liberation which did more than anything else to deliver the nation to the Communists.

The Germans were already in the First Czecho-Slovak Republic, from 1918 to 1938, a bulwark against Communism. Thus in the parliamentary elections of 1925, 42 of 182 Czecho-Slovakian seats went to Communists; of the 66 German seats only 6 were held by followers of Moscow. When the Social Democratic Party split in 1920 the majority of Czech Social Democrats joined the Communists, while only one-fifth of the Germans did the same

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thing. Thus the expulsion of the Germans was bound to be beneficial to the Communists. To this must be added the fact that the Communists very ably used the expropriation of the Sudeten Germans to strengthen their position in the nation's economy by gaining the lion's share of the spoils. On July 25, 1947, Godfrey Lias, one of President Benes' most active apologists, wrote in the London *Times*: "Through their control of the Ministry of Interior and Agriculture the Communists were able to create in the frontier regions a party-state within the state." This was the first time that in the pages of the *Times*, which to that moment had fully supported the Benes regime, the Communist danger in Czecho-Slovakia was being mentioned. The *Times'* readers suddenly learned that through the banning of the Agrarian Party, many farmers had been pushed into the arms of the Communist Party: "Probably the strongest group of Communist supporters among the peasants were those who had received German land in the frontier regions."

Farmers enriched by the expropriation of Germans were not the only followers which the Communists were able to gain with the help of Dr. Benes. The decisive role in the battle between the Communist and the non-Communist parties — in 1946 the Christian People's Party, the Slovak Democratic Party and, to a lesser degree, the Czech National Socialist Party — was played by the decree which gave complete amnesty for all acts of violence carried out during the so-called revolution. The presidential decrees were issued in violation of the constitution. Benes had resigned from the Presidency in October, 1938, not because of strong foreign pressure, but because he was compelled to give in to adverse public opinion. He had sent his congratulations to the newly elected President Hacha from America. At first the Allies had refused to recognize the government which he formed in 1940 in London. The only genuine supporter he had was Anthony Eden. Thus in order to bolster his power and to destroy his opposition, Benes made a complete alliance with the Soviet Union. He rode into Czecho-Slovakia on the coat-tails of the Red Army coming from the East; he thus passed through the Podkarpatska Rus which, in a secret treaty, he had already offered to the Soviets in exchange for financial and diplomatic aid. This completely illegal decision was to give Russia the essential military bridgehead on the southern slopes of the Carpathian mountains. In April, 1945, Benes formed a government in Kosice in which the Communists already held the decisive positions. His "program of Kosice" was inspired by the Communists. In order to prevent the expression of public opinion, the President decided to rule by decree in a period of transition, although it would have been easy to elect a Constituent Assembly immediately following liberation, as Austria did in November, 1945. Benes thus established a personal dictatorship. He permitted elections only in May, 1946, when he and the Communists had successfully weakened the social fabric of his nation and changed the legal order.

On May 16, 1945, Benes had entered Prague. In his first speech he declared that "the country must be completely purged of Germans." On May 25 the Communist Minister of Propaganda stated that the Army was in readiness "to clean out the border areas of Germans and Hungarians and to give back all these old Slav territories to the Czechs." These German "colonists" had settled in the area in the 12th and 13th century. The Germans had developed these virgin lands at the invitation of the Bohemian dukes and kings, 400 years before the Pilgrim Fathers landed in America.

On June 19, 1945, Benes issued a decree which ordered the confiscation and division of all land owned by Germans and Magyars, as well as by all "enemies and traitors" to the Czech and Slovak people. The confiscation extended not only to land, houses, factories and machinery, but also to all the private property of German-speaking citizens, such as clothes, furniture and household goods. During the deportation (*Odsun*) every German-speaking citizen was only permitted to take with him 70 kilograms, including no valuables. In most instances the Germans had already been robbed

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in the concentration camps to the point that they had nothing but the clothes they were wearing.

IN THE MONTHS following May, 1945, Czecho-Slovakia was the scene of innumerable crimes. According to the official statistics of the German Federal Republic,[1] 225,000 of 3,000,000 Sudeten Germans were killed — every 13th German-speaking citizen of Czecho-Slovakia was slaughtered during the orgy of terrorism. The first official Czecho-Slovak statistic[2] stated that the number of Czechs killed during the Nazi regime amounted to 60,000 — that is, one Czech out of 150. Later, the Prague Communists increased this number to 335,000, an obviously fantastic exaggeration. But even if it were true, the losses of the Czechs and the Slovaks would be much smaller than those of the Germans: one dead out of 27 inhabitants.

With indignation, a true Czech resistance fighter wrote in the Socialist weekly *Cil*:[3] "We witnessed how human rats who had shown nothing but cowardice sallied from their holes against the vanquished enemy in order to avenge themselves in shameful manner for their own dishonor. We also saw uniformed and non-uniformed mobs who had insolently put on the Red armband of the revolutionary guards, attack dwelling places and plunder them. . . . This wave of crimes finally influenced even some among the true freedom fighters. It was the tragic consequence of the general demoralization brought by these hyenas."

This state of affairs laid the ground for what happened in the 1946 and 1948 elections. Dr. Benes personally was largely responsible for the disregard of human rights in his country. On May 8, 1946, he proclaimed spontaneously the so-called amnesty-law, whose first paragraph stated: "Any action carried out in the period between Sept. 3, 1938, and Oct. 28, 1945, with the intention to help the fight for the reestablishment of Czech and Slovak freedom or which was a just vengeance for the crimes of the occupants and their associates is not illegal even if it is punishable by law." Of course this paragraph in fact exclusively covers what happened between May 8 and Oct. 28, 1945. In most cases, as the long period of 5½ months after Germany's surrender shows, acts covered by the amnesty were not emotional vengeance, as might have occurred in the first days of the liberation; indeed the great majority of these were crimes organized in cold blood.

In Prague alone, according to Czech newspapers published in June, 1945, there were 27,000 "suicides" of Germans within the three weeks following May 8. On that day there lived roughly 60,000 Germans in Prague, to which must be added a large number of wounded soldiers in hospitals who were killed almost without exception. In other words, according to the Czech press itself, we are asked to believe that almost 50% of all Germans committed suicide. It is quite obvious that, in reality, the word is simply a euphemism for murder and execution. No nation can stand such a wholesale outbreak of bloodlust without deep-seated moral and psychological consequences. This may well be an important cause of the Czech flight into Communism, which alone would give them protection from their bad conscience and a possible future vengeance. One must add that literally hundreds of thousands of Czechs were also imprisoned, robbed and even killed for alleged collaboration. There is good reason to believe that in the statistic of Czech victims of the war published by the Communists, these dead were also included and simply put to the German account.

Dr. Benes' Secretary, Edvard Taborsky, admitted that his chief had already thought of the expulsion of the Germans in 1939,[4] that is to say, at a time when there was as yet no cause for such cruel vengeance. In 1943 the Czech President-in-exile received Moscow's consent for his plan. In exchange he offered to the Russians the transformation of his state into a Communist province. In the so-

[1] *Vertreibungsverluste* (Wiesbaden, 1958), p. 325 ff.; p. 355.
[2] *Encyclopedia Americana*, vol. VIII, p. 383.
[3] No. 19 (May, 1947), p. 23.
[4] *Pravda Zvitezila* (Prague, 1947), p. 207.

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called "Narodni Fronta" which ruled the country after the manifesto of Kosice of April, 1945, and which gave Benes his dictatorial powers, only those parties were represented which in the emigration had supported Benes' close alliance with Moscow: Communists, Social Democrats, National Socialists and Populists. On the other hand, the Republican Party (or Agrarians)—which had between 1925 and 1939 the strongest party in the Czech parliament and which from 1920 to 1939 had given the country all its Prime Ministers, a party which had produced first rate personalities like Antonin Svehla and Milan Hodza—was banned by presidential order. A similar fate befell the National Democratic Party, which was headed until 1937 by the great Czech patriot Karel Kramar, who had been condemned to death during the First World War, been released by Emperor Charles and had become Czecho-Slovakia's first Prime Minister. If, in the case of the Agrarians, one could argue that one of their members had been for a time Prime Minister in the Hitlerite Protectorate, not a single act of collaboration could be charged against the strongly nationalistic National Democrats. Their only crime was that they had opposed Benes' policy of alignment with the Soviet Union.

IT WAS OBVIOUS that these measures were aimed at the extermination of those national Czech forces which had prevailed during the critical days of May, 1945, and had tried to establish ties with the West. Thus the path was open for the Communists. Gen. Ingr, who had been Minister of War in Benes' London exile government and had escaped to England after the events of February, 1948, declared immediately upon his arrival, in an interview with the London *Catholic Herald,* that the Army, which was in majority anti-Communist, was completely ready to prevent the Communist take-over and to guarantee a liberal order. But, as in 1938, Benes had been too cowardly to give the order. He had betrayed his people and liberty. This statement, coming from one of the most prominent collaborators of Dr. Benes, seems to show that the latter was driven by lust for personal power, had tried desperately to retain his position, and had hoped, even in 1948, to stay on as head of the State by carrying out the will of the Communists unquestioningly. That is why he remained in office despite the murder of two of his faithful friends, Jan Masaryk and Drtina, and the transformation of the People's Democracy into open Communist Party dictatorship. Maybe his attitude was logical from his point of view. He had made his alliance with the Soviet Union in 1935 and had been elected President with the help of the Communist votes. In 1941 and 1943 he had delivered himself into the hands of the Communists and in 1945 had covered with the mantle of his name and authority all the crimes committed by left wing totalitarians. He had thus destroyed the moral foundations of a democratic community and delivered to the totalitarians the most important positions in the State. Such premises made final surrender to Gottwald just a matter of time. A few months after this last step, Benes was to die, alone, dishonored, and dismissed from the office to which he had clung so desperately and for which he had sacrificed all higher principles.

The Sudeten German leader, Wenzel Jaksch, who during the war was an emigre in London and at present is a Socialist member of the German *Bundestag,* has shown in his remarkable book, *Europe's Road to Potsdam,*[5] that Benes not only betrayed his own people and the Slovaks to Moscow, but also contributed decisively to the loss of Poland by giving President Roosevelt false information on Stalin's plans, and selling the American public on the pipedream of a democratic Russia.

Thus the moral fiber of the Czech people was destroyed. This is felt even today. Khrushchev's strongest support in the Eastern bloc comes from Czecho-Slovakia. It is only when Communism will have been defeated in Warsaw, Budapest and East Berlin that we can expect an end of totalitarian rule in Prague.

[5] Stuttgart, 1958, p. 378 ff.

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The Case Against Coercion

ROBERT CUNNINGHAM

IT IS A RATHER easy sport to show how particular collectivist measures have gone awry. But we conservatives cannot neglect the task of attempting to articulate a theoretical justification for our position. And this is especially important for a journal such as *New Individualist Review*. In this article I have attempted to outline some of the more general and abstract arguments for limiting governmental coercion to the narrowest possible sphere. While one cannot in so brief a space show conclusively where the line between governmental and non-governmental action should be drawn, I hope to provide support for the premise that is fundamental to the conservative position: that a *prima facie* case exists against governmental coercion when extended beyond its role of preventing violence by private individuals, and that consequently the burden of proof is always on its proponent.

To avoid the usual arguments over the "true meaning" of coercion, I will stipulate the following definition. Coercion is violence or threatened violence designed to cause a person either to perform an act or to refrain from performing one. Most would agree that governmental coercion in this sense ought to be used against the private coercive action of one citizen directed against another, and against those agents of foreign governments who initiate coercion against us. Are there good reasons for wanting to minimize the overall coercion of one man by another, whether by an agent of government or by anyone else? Are there reasons for wanting to maximize "freedom" (which I stipulate to mean the absence of coercion initiated by one man against another)?[1]

When coercion is exercised upon a man, he does not act according to his own plans and for his own ends, but out of fear, acts as a tool in the hands of him who coerces. Not only are certain choices closed to him, but the opportunities freedom offers for self discipline are closed to him. Whenever the sphere of fully voluntary acts is thus narrowed, the number of choices open to the agent is reduced and he will consequently find it impossible to act in accord with the best judgment of his own conscience; and so not only the egoist, the man who lives for himself, but even the altruist prefers to be left free to make his own choices.

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[1] Freedom is a word with many meanings: Isaiah Berlin tells us that over 200 have been recorded by historians of ideas. I have given one of them, and when I use the word without qualification, "absence of initiated coercion" is substitutable for it. I do not in so defining "freedom" wish to deny that there are other goods which ordinary usage in some contexts may justify calling "freedom," "freedoms," "liberty," etc.; if one wishes to say that other "freedoms" are more valuable than the absence of initiated coercion, I shall be willing to hear him out—for in giving a definition I have proved nothing.

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Coercion may be justified insofar as it removes obstacles to virtuous acts, and it is on this ground that coercion of children by parents may be justified: the bulldozer of coercion cannot build the house of virtue, but can push away the obstructions of unrestrained passion. Coercion of adults cannot be justified for this reason because nothing similar to the loving interest and detailed knowledge that parents can be presumed to have of their own children—and how many are the blunders of parents!—can be found on the part of governors of adults. Such interest and knowledge *may* exist, but there is no institutionalized way of picking out those who possess it. The appropriate means for one adult to lead another to a good end is persuasion, example, moral suasion, etc.—all of which attempt to affect only the choice and not the physical environment or body of the actor.

Unless an adult is permitted to guide himself to his own ends, he will fail to concern himself with matters which he knows best and cares for most. And unless there were some assurance that the governor's circumstantial knowledge of and concern for what is good for each individual exceeds that of the individual, it could not be justifiably claimed that the governor is right to coerce individuals for their own good. As Thoreau said, "If I knew for a certainty that a man was coming to my house with the conscious design of doing me good, I should run for my life."

There is a question one might raise about this analysis: "How distinguish coercion from other forms of non-rational influence?" One cannot of course deny that people differ in ability to withstand pressures of various sorts, and that there are circumstances in which some individuals will fear certain moral sanctions as strongly as they would fear threatened violence. But though at the margin non-coercive forms of pressure may be as strongly felt as the threat of physical violence, one must not blur the difference between the two: Not only is it far easier for a man of conviction to resist jeers than it is to resist a club, but it is also true that while one can usually accomplish his ends though he feels the force of social disapproval, one cannot usually accomplish his ends when in jail.

Thus far we have said, in sum, that governmental coercion is desirable as a means of reducing overall coercion, and that there is an initial prejudice against using coercive measures for other reasons, because an act done under coercion fails to be a fully voluntary and thus a fully valuable human act. On this analysis, governors are the guardians of the peace, not spiritual directors. The conservative position is that governors hold a warrant only to promote that outward peace without which social life is impossible. As Jefferson said in his first inaugural address, government is to confine itself to restraining men from injuring one another: "this is the sum of good government, and this is necessary to close the circle of our felicities." There is no way to guarantee the possession by agents of government of the special wisdom and other virtues demanded to know and carry out progress which uses coercion to make people *good*, or *better*. To put this point another way: I may believe I know what is good for you, but I do not trust you to know what is good for me. And if I might lose my power to coerce you for your own good, and if you might gain power to coerce me for my own good—then I want to deny myself the power to coerce you, and want to try to persuade you to deny yourself the power to coerce me. Surely it is true that individuals often act against their own best interests. Surely it is true that there are some who could use coercion to make people really better. But the problem is, how can we find these paragons of wisdom and virtue?

It should be clear that on this view of government, the most important question is not the classic *"Who* should rule?" but *"How* can we stop rulers from ruling too much?" For only if political sovereignty is thought to be essentially unlimited would the question "Who is to be sovereign?" be the only important question left.[2] The problem of getting rulers

[2] *Cf.* Karl Popper, *The Open Society and Its Enemies* (Princeton, N.J.: Princeton University Press, 1960), p. 120 *et seq.*

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who will always, or even more often than not, know and act for what is really in the best interests of all, beyond the minimizing of coercion, is practically insoluble; though of course every ruler and candidate professes love of and devotion to the "common good"—equivalent only to a denial that he is motivated by purely sectional concerns—and certainly no one could fault even Hitler in this respect. I am not maintaining the theory of the "outlaw conscience," *conscientia ex lex*, the theory that the individual's conscience is unrestrained and unrestrainable by anything other than its own subjective imperatives. Rather I approve a form of natural-law theory according to which certain moral truths (the Ten Commandments, let us say) are known with very little discourse. But I deny that any civil governor or governors, or even the majority of people in a democracy, will always or even usually act wisely when it is a matter not of minimizing overall coercion, but of coercing people to be better. This is not to say that one should not sometimes use every means short of coercion to lead others to what he considers to be virtuous activity or intelligent thinking about some matter. But he will either convince all or only some: if all are convinced, coercion will be unnecessary; if only some are convinced, coercion is, in my opinion, undesirable.

One must be willing to distinguish accurately between what is valuable in itself and what is a desirable goal of men acting through the instrumentality of the coercive state. To illustrate: one may believe that some men are "natural slaves" (in the Aristotelian sense); and yet, because of the difficulties of identifying these slaves and the dangers of giving to some men the power so to identify others, one may deny the desirability of a political order in which men are distinguished as "naturally" free or "naturally" slave.

Now even though the principle that state coercion is justified to minimize overall coercion be accepted, it must be in somebody's discretion to answer the question: is such-and-such a coercive measure necessary to prevent worse coercion? The formula "better prevention than cure" would tend to stifle spontaneity and to presume more knowledge on the part of governors than can reasonably be expected. So there is no easy answer to this question and at the margin there will be room for dispute. But some administrative arbitrariness may be avoided if the *onus probandi* be placed on those who propose new legislation and if such coercive measures as are adopted be general abstract rules, known beforehand, and equally applicable to all.[3]

A number of other reasons have been offered by political theorists for justifying the reduction of coercion to a minimum. Among them we find the alleged fact that there exists a sphere of private, non-social activity in which no one but the individual concerned is interested, a sphere which does not involve the well-being of others; and so in this sphere no government coercion is justified. But no such purely private sphere exists; all behavior affects others at least indirectly and remotely, and those effects of my actions, though relatively unpredictable, may be quite as important to others as the obvious and immediate effects. One cannot, furthermore, assume the relativist position that no one knows what is morally or otherwise good for the individual better than he himself does; to my mind, at least, relativism is an indefensible position. Nor can one assume that most men are morally good and can well be left alone to pursue their own interests; the contrary I believe more likely: most men are morally bad in that most men seek the good of sense in opposition to the good of reason. The only telling argument for minimizing governmental and other coercion is this: there is no way of getting rulers who will know and do what is best for all concerned. If there were a way of getting rulers who would use force when necessary to teach us to use our liberty rightly, to become strong in resisting the determination of our own instincts, to stand firm against non-coercive sanctions—the curled lip, the raised eyebrow, the cancelled invitation, the economic depriva-

[3] *Cf.* F. A. Hayek, "Freedom and Coercion: A Reply to Mr. Hamowy," *New Individualist Review* (Vol. I, No. 2).

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tion, the scorn and ridicule, or the applause, the bonus and the medal—then one might not unreasonably be willing to give up a measure of freedom; to stop insisting on as large a protected "private" sphere of activity as possible. This is not to say that each of us is a little god, almighty and allgood, who asks only to be left alone to enjoy himself and his works; it is only to say that the state is not in Hegel's words "a Big god almighty and allgood," whose will is carried out by angelic agents.

To sum up in a sentence: We need governmental coercion, but we want no more than is "necessary." But how much is necessary beyond what is called for by internal and external aggression? The conservative answer is: none. The hypothesis the conservative defends might be stated: if no more coercion be admitted than is necessary to reduce coercion to an overall minimum, then the conditions of the "good life" will be preserved. How could we verify this hypothesis? By attempting to falsify it, and failing. If we could find some interventionist measure (one by which government interferes with the voluntary actions of individuals to force them to do or refrain from doing certain non-coercive acts) whose consequences would be on the whole beneficial, then we should have falsified the hypothesis. Now the conservative does not hold that should one, or even a number of interventionist measures be introduced, the sky will crack and the world tumble about our ears. Some governmental interventions have worse consequences than others; one should take the middle path when the best path is closed; etc. But the conservative does hold that the fact that coercive measures are introduced "democratically" does not make them less undesirable. And he does believe that the better arguments can be found on the side of those who oppose interventionist measures—measures such as minimum wage laws; price and rent control; Social Security; FEPC legislation; Communist Party registration; the establishment of "free" and public schools; tariffs and quotas; regulatory commissions such as the ICC, the FCC, and the like; government monopoly of the post office; state licensing provisions; and the TVA. Now every such interventionist proposal would require a careful critique if one expected to convince a reasonable person of the rightness beyond question of the conservative position. It seems to me, however, that at a minimum the considerations we have just educed on the undesirability of coercion unmistakably throw the burden of proof on those who announce plans to increase the scope of governmental activity.

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Ireland,

Victim of Its Own Politicians

JOHN P. McCARTHY

IRISH-AMERICANS are earnestly proud of their Irish heritage. At the annual St. Patrick's Day festivities they vigorously assert their determination to further Ireland's freedom and national unification, and indulge in a few Anglophobic outbursts. But as soon as the ceremonies are over, they return these Fenian enthusiasms to the attic storerooms and once again become preoccupied with the problems and concerns of those institutions to which they owe their primary loyalties: the United States and the Catholic Church. This is fortunate, not only for American politics which has one less overseas political loyalty to have to appease, but also for Ireland herself. Irish-American involvement in Irish problems would scarcely benefit Ireland. Because of their lack of understanding about Ireland's real needs, Irish-American circles would probably only aid the nationalist politicians in Ireland who are primarily responsible for Ireland's present difficulties. These Irish politicians would use Irish-American sympathy for Ireland solely to cover up their own inadequacies by reassuring the Irish electorate that there is overwhelming support in America for their policies. For instance, Ted Kennedy's two-day visit to Ireland last spring is used by Irish politicians to assure their constituents that all will go well because Ireland has an ardent champion in the American Senate.

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Ireland's present difficulties are attributable not to British tyranny nor to partition, but to the ineptitude of many of the people who have been governing Ireland since national independence was won, especially since Eamon de Valera's assumption of power in 1932. A further tragedy is that the natural Irish rebelliousness and political ingenuity has been lulled to sleep because of self-satisfaction with the very fact of having independence. Probably because of a political inferiority complex, Irishmen will scarcely criticize their own government in front of foreigners lest their listeners think the Irish are unfit to govern themselves.

Simply because an activity or policy is followed by an independent Irish government, Irishmen tend to think that it has to be supported regardless of its merits. As a result, Ireland has let herself be dominated in the past thirty years or so by a band of fattened revolutionaries, who are profiting from the memory of their exploits during the revolution of 1916-1921, but who are scarcely concerned or competent to deal with Ireland's most pressing needs. This incompetence especially injures the greatest section of the Irish population, the people living on farms. The greatest gains made by the Irish farmers — the ability to own their own land and the initiation of the co-operative creameries — began in the last few years of British rule. They have had no comparable gains since then. But before discussing these

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politicians and their policies, let us examine the history and development of Irish independence.

PRIMARILY BECAUSE of the political genius of Irish leaders, such as O'Connell and Parnell, most of the frightful injustices under which the Irish suffered had been removed. Catholics had been admitted to Parliament in 1829, the Episcopal Church in Ireland was disestablished in 1867, and in the 1890's and early 1900's landlordism disappeared as the British Government assisted the Irish peasants in becoming the proprietors of their own land. In earlier history, especially during the penal days in the eighteenth century, British power in Ireland was used solely to benefit the land-grabbing Protestant "Establishment." But in the thirty years before World War One, the British ministry and Parliament had begun to govern for the benefit and well-being of all the Irish population. Railroads were extended to the neglected Irish western seaboard, a Department of Agriculture was set up to help the new peasant proprietors modernize their farming methods, and educational opportunities were extended, including the establishment of a non-denominational National University.

The major remaining objective of the Irish Nationalist representatives in Parliament was to gain Home Rule for Ireland, that is, an independent legislature for Ireland with responsibility for Irish domestic affairs. By 1911, the British ministry itself was committed to the passage of a Home Rule Act. Since the veto power of the Tory House of Lords had been removed, a Home Rule Act seemed certain of success.

The only obstacle was the refusal, even to the point of arms, of the Protestant section in Northern Ireland, Ulster, to accept being ruled by a Home Rule Parliament. An attempt at compromise was made as the Unionist leader, Edward Carson, modified his total opposition to any Home Rule to simply an insistence on the exclusion of six of the Ulster counties from a Home-Ruled Ireland. John Redmond, the Nationalist leader, was willing to accept the exclusion of part of Ulster, but insisted that two of the six counties, Tyrone and Fermanagh, which had Catholic and Nationalist majorities, should be included under Home Rule. The Unionists would not agree to this, and when the World War began the ministry postponed any action on Home Rule. The prospects for it at the end of the war were bright, though, for, as King George V told Redmond in a private conversation, everyone, himself included, regarded Home Rule as inevitable.[1]

But then, on the virtual eve of the attainment of Home Rule, a futile uprising occurred in Dublin in Easter Week, 1916. The rebels, led and inspired by a group of Gaelic language revivalists, labor leaders, and intellectuals, rejected the Irish Nationalist Party's policy of working within the British Parliament to achieve Ireland's objectives. To them, Ireland's political independence was not something to be requested from the British Parliament. Wanting not just legislative independence or Home Rule, they proclaimed "the Irish Republic as a Sovereign Independent State."

Irish popular sentiment was still behind the parliamentary Nationalists. However, the heavy-handed treatment of the rebels by the British military authorities and Lloyd George's decision in April, 1918, to request an extension of the draft to Ireland caused a shift in public feeling to the Sinn Fein, the political party of the rebels. Irish sensitivity had been offended by Lloyd George's move because there were already many Irish volunteers in the British forces, and Redmond's offer to have Irish Volunteer Militia units called to active service had been rejected by the War Office.

The Sinn Fein won 73 of the Irish seats to Parliament in the 1918 general election, against 6 for the Nationalists, and 26 for the Unionists. Yet, the Sinn Fein M.P.'s refused to sit in the British Parliament (where they would have been able to take part in the probable passage of Home Rule legislation). Instead, they

[1] Edgar Holt, *Protest in Arms, the Irish Troubles, 1919-23* (New York: Coward-McCann, 1961), p. 47.

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declared a *de facto* Parliament of Ireland (Dail Eireann), and demanded the removal of the British forces from Ireland as well as the dissolution of the Royal Irish Constabulary, the police force in Ireland. Then, following a series of attacks on the British military by the Irish Republican Army, the military arm of the insurgent Irish government, fierce guerrilla warfare was initiated and covered Ireland for the next two years.

A compromise between the different sections in Ireland became even more improbable now that southern sentiment had shifted from the Parliamentary Nationalists to the Sinn Fein. The Sinn Fein refused any compromise solution, but insisted that the north must be governed by and accept, not a Home Rule Parliament granted by the British Government, but the *de facto* republican government which the Sinn Feiners claimed to be the government of all Ireland. The Redmond party, at least, would have accepted the exclusion of some northern counties from the Home Rule section of Ireland. Home Rule Ireland would also have maintained some connection with Britain. This and the control of the independent Irish Parliament by experienced parliamentary leaders might have made the Unionists amenable to an eventual re-unification.[2]

LLOYD GEORGE PASSED a Government of Ireland Act, which set up two separate Home Rule Parliaments, one for the twenty-six southern counties and one for six Ulster counties, including the predominantly Catholic and Nationalist Tyrone and Fermanagh. King George V opened the northern Parliament on June 22, 1921, expressing his wish for eventual re-unification. The Sinn Feiners had been elected to the southern Parliament, but they refused to operate it since it was not the republican Parliament of all of Ireland.

Then, the British Government entered into direct negotiations with representatives of the rebel government. A treaty was drafted and was accepted by the rebel Parliament in January, 1922, whereby Ireland was given more independence than had been sought for by the pre-Sinn Fein Irish leaders. The twenty-six counties received not just legislative independence, but a complete government as well as the evacuation of the British military. The only restriction on the independence of this Irish Free State was that it was to be a member of the British Commonwealth, with a representative of the Crown present in Ireland and an oath to the King required of members of the Irish Parliament. Also, the Irish Free State was to allow several Irish harbor facilities and defenses to be maintained by the British forces.

Many republicans, such as Eamon de Valera, regarded the treaty's acceptance of membership in the Commonwealth, the oath to the King, and the continuing partition as a betrayal of the Sinn Fein principles of an independent Irish Republic. The pro-treaty forces had won the Parliamentary election of the Irish Free State's provisional government. However, civil war broke out between the die-hard rebel army, the IRA, and the new professional Irish Free State Army being recruited in accord with the treaty.

The republicans were defeated (although the Chairman of the provisional government, Michael Collins, had been killed in an ambush), and ended fighting in April, 1923. The political arm of the republicans, the Sinn Fein, continued its opposition to the treaty as its members refused to sit in or recognize the Free State Parliament to which many of them had been elected. Then de Valera organized a new republican party, the Fianna Fail, whose members would accept their seats in the Parliament. In the 1927 elections, the pro-treaty party, now called Cumann na nGaedheal, maintained its majority with W. T. Cosgrave remaining as President.

In 1925, a Boundary Commission (with representatives from Northern and

[2] Michael Sheehy in *Divided We Stand* (London: Faber and Faber, 1955) argues that southern extreme nationalism following the decline of the Parliamentary Nationalist Party did more than anything else to insure the permanence of partition.

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Southern Ireland and Britain), called for by the 1922 treaty, suggested, over the dissent of the southern Irish member, that the *status quo* boundary between Northern and Southern Ireland be maintained, despite the fact that there were nationalist majorities in many northern areas. This was rationalized on the grounds that the economic survival of Northern Ireland as a separate entity necessitated the inclusion of these predominantly nationalist areas in Northern Ireland.

The southern government's dissatisfaction with this report was resolved by a new agreement in December, 1925, which replaced the 1922 treaty. The Boundary Commission and the contemplated "Council of Ireland," where both sections could have met together on common problems, were dissolved, but the *status quo* partition was accepted. At the same time the British Government and the Free State cancelled their respective liabilities towards each other. Then, by an agreement reached in March, 1926, the Free State agreed to transmit to the British Government the annual payments on land annuities collected from the former tenants who had purchased their estates under the 1903 Land Act.

Under this Act many Irish tenants were enabled to buy the land on which they lived solely by promising to pay the annuities over a period of 68 years to the British Government which had compensated the landlords. The landlords had been compensated by being issued stock on which interest was paid out of the monies collected as annuities. As a result of this 1926 agreement the Irish Government agreed to collect and to transmit to the British Government the annuities which amounted to about £5 million annually.

IN THE 1932 GENERAL elections de Valera's Fianna Fail Party won control of the Free State Government which they, as republicans, had originally refused to recognize. With the two short exceptions of 1948-51 and 1954-57, the Fianna Fail has since been in power. Therefore, the record of Irish development in the past thirty years must to all intents and purposes be considered as the Fianna Fail record.

Intent on achieving the old republican goal of breaking all ties with Great Britain, the Fianna Fail Government removed the oath to the King from the Free State constitution, and continually slighted the King's representative in Dublin, the Governor-General, whose legal powers were removed. The right of appeal from the Irish courts to the British Privy Council was abolished.

These gestures naturally made the Unionist Government of Northern Ireland permanently opposed to any reunification, for it realized that re-unification with the Fianna Fail Government would involve dissolution of the British connection to which the Unionists were so committed. Those who suffered most from de Valera's strict republicanism were, of course, his nationalist allies in the north, for the possibility of a compromise whereby they would find themselves in a united Ireland was now removed. The only alternative course for the northern nationalists (who in County Tyrone and County Fermanagh were the majorities, justly entitled to incorporation with the Southern Government) was some sort of rebellion. To prevent this, the Unionist Government placed stringent restrictions on the nationalist and Catholic minorities in the north.

De Valera then refused to abide by the 1926 agreement to transmit the land annuities to the English Government. This refusal would have been justified if de Valera had based it on the grounds that the former landlords really had no right to have owned the land in the first place, since they had gained it by confiscating it from the original owners in the 16th and 17th centuries. The tenant-purchasers were the true successors of the rightful owners whose land had been taken in those centuries, and therefore they should have no obligation to compensate the illegitimate "landlords" nor to pay annuities for their own land.

But de Valera contradicted this reasoning, for he did not end the obligation

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of the tenant-purchasers to pay annuities. The only thing he did was to insist that the annuities be collected for his government rather than for the old "landlords."

The British Government naturally retaliated against de Valera's action by raising special duties on imports from the Irish Free State. De Valera replied by imposing higher duties on imports to Ireland from Great Britain, and an economic war between both nations began. Naturally, Ireland, the agrarian and exporting country which had always relied on British markets to sell its products in and which was dependent on British manufactured goods, was bound to be the loser.

As a result of the economic war, Irish agriculture became so disorganized that its export capacity fell by 50%. But this did not trouble the Fianna Fail theorists, who saw the war as an opportunity to further their ideals of separation from Britain and of economic nationalism. It should be remembered that the social forces behind the Irish Revolution had not been the impoverished farming community, which had supported the nineteenth century struggles, especially those against landlordism. Rather, it came from the many children of the farmers who had been forced to seek work in the towns and cities. "Surplus children squeezed into the towns and cities, and found there that all the power and most of the wealth was in the hands of people of a different religion, racial origin, or political loyalty." It was this ambitious urban class which had come to power in Ireland.

This class was not a laboring class. Rather, "the more able among them were petit bourgeois, middle-men, importers, small manufacturers . . . a new twentieth-century middle-class to fill the vacuum created by the departure or depression of the earlier alien middle-class . . . they were rising to sudden wealth behind protective tariff-walls . . . [and] had a vested interest in nationalism and even in isolationism."[3]

[3] Seon O'Faolain, "Fifty Years of Irish Writing," *Studies*, Vol. LI, no. 201 (Spring, 1962), p. 97.

During the economic war and ever since then, there has been considerable industrial expansion in Ireland, part of it, no doubt, having been encouraged by protective tariffs as well as by government credits. Furthermore, a sizeable part of industrial progress in Ireland has been due to government investment, as state-sponsored boards and companies cover an extremely wide field in production, communications, marketing, research, development, finance, and sports. No doubt much employment has resulted from this industrial development, but its long range effect on Ireland's welfare is still to be determined. This is especially so if government protection and subsidization of certain industries penalizes other activities such as agriculture, which have much more basic importance to Ireland.

In 1938 the economic war ceased, following an argument between de Valera and Neville Chamberlain. The land annuities dispute was resolved by English acceptance of a final Irish payment of only £10 million, and both nations removed the special duties imposed during the economic war. Chamberlain would not heed the Irish request that he put pressure on the Northern Government towards unification, but he did agree to revoke the 1922 agreement by withdrawing the British forces from the Southern Irish ports of Cobh, Berehaven, and Lough Swilly.

A new Irish constitution was drawn up whereby the name "Ireland" was substituted for "Irish Free State," and the only remaining connection with Britain was by membership in the Commonwealth. The King was regarded as the head of that association, but not someone entitled to an oath of allegiance. De Valera assumed the new office of Prime Minister or "Taoiseach," and Douglas Hyde, a leader of the old Gaelic League, was elected to the honorific Presidency. Then in 1949 Ireland broke the last ties with Britain, as it withdrew from the Commonwealth and Ireland was proclaimed a Republic. Paradoxically this was done not by the Fianna Fail Party, but by a coalition government headed by J. A. Costello of the Fine Gael Party,

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the successors of the Cosgrave Free State Party. Costello had agreed to leave the Commonwealth as a bargain to gain the parliamentary votes of an extremist republican party.

IN CONTRAST TO the industrial expansion, Irish agriculture has hardly developed as one might have expected since the achievement of national independence. This agrarian failure is partly attributable to the economic war of the 1930's. This was a loss which could not be compensated by the numerous welfare schemes offered to the farmers by the de Valera government. In Ireland there are many pensions for the elderly people, widows, and orphans; new houses are provided, and there is an extensive government sponsored hospitalization scheme. Despite these welfare advantages, however, the number of agrarian workers in Ireland has declined since the 1920's. The growing industrial capacity of Ireland has scarcely been able to absorb those leaving the farms. Instead, most have emigrated to the industrial areas of England and the United States. Emigration from Ireland is so great that Ireland shares with only East Germany and North Vietnam the dubious distinction of being a nation with a declining population.

The standard of living, measured by the increased amounts spent on food, tobacco, drink, clothes, fuel, light, entertainment, and on motor cars, has improved — but this is only because there was so much emigration which prevented mass unemployment and limited to a low level the total number dependent on the national income.

The emigration from rural areas to industrial urban areas is a common feature in the modern world. But accompanying the decline of agricultural laborers in many nations has been a substantial modernization of agricultural methods and a sizeable increase in agricultural productivity. In comparison with many of these nations, though, Ireland is failing to modernize significantly its agricultural methods or improve its productivity.

Irish leadership should be aware that Ireland's natural resources are too limited to create a serious manufacturing economy in Ireland. Fortunately, the new ministry of Sean Lemass, who succeeded de Valera as the Fianna Fail leader when the latter assumed the nonpolitical office of President in 1959, is receding from the old ideals of economic nationalism. Instead of protecting and subsidizing industries which would be incapable of meeting foreign competition and would penalize the domestic Irish consumer, the Government is now encouraging private investment in Ireland by foreign capital. Tax concessions are granted to the imported industries with hopes that these industries will be successful in foreign markets.

However, it is not enough simply to encourage manufacturing. Ireland's economy can only prosper by emphasizing and developing the most naturally advantageous industries: agriculture and fishing. This is especially so if Ireland is to join the Common Market, where Ireland will scarcely be able to compete in manufactured goods with the other Common Market members. As an agrarian country, Ireland will have to reconcile herself to a certain amount of emigration. But, by improving her agricultural methods and expanding productivity, the amount of emigration can be lessened and greater prosperity and well-being can be obtained for the bulk of the population.

The government should not expect to encourage agricultural improvement by the present system of welfare assistance, pensions, and housing grants. These forms of assistance to the farmer are scarcely large enough to serve as capital with which to improve his methods. Indeed, by providing a certain amount of minimum comforts they probably engender a spirit of self-satisfaction and disdain to change or improve himself.

Government facilitation of more liberal credit terms in acquiring new machinery is, of course, more useful to the farmer than would be unproductive doles. At the same time, the farmer has to be

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encouraged to abandon the traditional Irish small 30-acre farm, which is incapable of competing in a modern economy, in favor of larger scale co-operatives. The dairy products co-operatives encouraged by the Agricultural Department set up under British rule probably did more than anything else to improve the lot of Irish farmers.

Irish fishing needs more encouragement. In view of the frequent presence of so many Danish trawlers within a few miles of the Irish coast, it should be expected that a modernized and well-equipped Irish fishing fleet could successfully compete in the European market and provide thousands of job opportunities in Ireland. At present, however, the Irish fishing industry is in a relatively primitive state, with much fishing being done by independent fishermen with unmotorized craft.

Until the leaders realize the full potentials of Irish agriculture and fishing, and recognize the marginal value of so much of the manufacturing and tourism which the government encourages, the Irish economy will scarcely be able to hold its own, never mind prosper, in the Common Market.

A curious policy of the Irish Government has been its efforts to encourage the revival of the Gaelic language. Irish enthusiasm for the old language is understandable. In other centuries, the Anglo-Irish Establishment had deposed the Gaelic-speaking Catholics from their own land and insulted the natives by making English the official language of Ireland. The Irish people were successfully induced to speak English in national schools, and an attitude was nurtured to regard the inability to speak English as a sign of ignorance.

But the Gaelic enthusiasts should reconcile themselves to the fact that the overwhelming majority of Irishmen are English speaking, and are unlikely to be won over to a Gaelic revival. This, despite the compulsory studying of Gaelic in the national schools as well as the requirement to speak Gaelic in most civil service positions. There are many areas in western Ireland, known as Gaeltacht, where a high percentage of the people can speak Gaelic. But even in these areas most of the people, especially the younger ones, speak English despite their eligibility for government grants for the ability to speak Gaelic. Significantly, it is the Gaeltacht areas that have the highest rate of emigration, emigration to such non-Gaelic speaking areas as London and New York.

Another feature of the Irish Government's policy has been its "neutralism" in foreign affairs. It justified its non-involvement in World War Two and its refusal to join NATO on the grounds that part of Ireland had been "imprisoned" by one of the Allies, Great Britain. Most of the Irish people are firmly anti-Communist and very sympathetic to the policies of the United States (especially since the election of John F. Kennedy). However, it is becoming fashionable in many Irish intellectual and political circles, especially since Ireland's entry into the UN, to consider their nation as one of the peaceful nations uninvolved in the Cold War and allied only with the anti-imperialist struggles in Asia and Africa. All of this would have been very innocent except for Ireland's commitment to the UN assault on Katanga, where quite a few Irish soldiers lost their lives as a result of the policies of the historian-turned-diplomatic-adventurer, Conor Cruise O'Brien.

IT IS NECESSARY that new leadership arise in Ireland to replace the romantic and opportunistic governing circles who have refused to acknowledge the twentieth century. Ireland must shake itself loose from its Gaelic romanticism and accept the rightful burdens, concerns, and *Weltanschauung* of a modern Western European nation. Unless it does so, Ireland will be neither a modern nation nor a romantic Gaelic "other world." Instead it will be simply a tourist resort, with most of its native population having departed through emigration.

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NEW BOOKS AND ARTICLES

THE FOLLOWING IS A SELECT LIST OF BOOKS AND ARTICLES WHICH, IN THE OPINION OF THE EDITORS, MAY BE OF INTEREST TO OUR READERS.

James M. Buchanan and Gordon Tullock, *The Calculus of Consent.* Ann Arbor, Mich.: University of Michigan Press, 1962. $6.95. An attempt to apply a rigorously scientific approach, based primarily on game theory and marginal utility analysis, to the problems of democratic government.

Milton Friedman, *Capitalism and Freedom.* Chicago: University of Chicago Press. $1.50, paper. Happily, a paperback reprint of Prof. Friedman's book, published last year, has already been issued. Tightly-reasoned and bold in its conclusions, this volume is an excellent example of the approach of the "Chicago school" of neo-liberal economists.

George B. de Huszar, editor, *Fundamentals of Voluntary Health Care.* Caldwell, Idaho: Caxton Press. $6. An intelligent selection of pertinent and cogent essays on voluntary as against socialized medicine, by a number of experts in the field.

Michael Oakeshott, *Rationalism in Politics.* New York: Basic Books. $6.50. A collection of essays on politics, ethics and related subjects, permeated with Burkeanism and written by one of the leading contemporary British conservative writers.

Edmund A. Opitz and Robert LeFevre, *Must We Depend upon Political Protection?* Colorado Springs, Colo.: The Freedom School. 75¢. A debate on "limited" vs. "no" government.

Hans Rothfels, *The German Opposition to Hitler.* Chicago: Regnery, 1962. $4.00. A new edition of the classic introduction to the internal opposition to Nazism, which culminated in the attempted *coup d'etat* of July 20, 1944. A stimulating review of Rothfels' book appears in the Winter, 1962-63, *Modern Age.* Prof. Klaus Epstein here argues that Roosevelt's foreign policy in regard to Germany and Russia was so perverse that, within its framework, we must be grateful that the *coup* did *not* succeed!

Eliseo Vivas, *Relativism: Its Paradoxes and Pitfalls.* Pamphlet; free copy available from Intercollegiate Society of Individualists, 629 Public Ledger Building, Philadelphia 6, Pa. An interesting, if oblique, handling of the thesis of the relativism of moral values, by a distinguished professional philosopher.

J. K. Zawodny, *Death in the Forest.* South Bend, Ind.: Notre Dame University Press. $6.50. A detailed and comprehensive examination of the facts concerning the massacre of 10,000 Polish officers and intellectuals at Katyn Forest in 1940 by the Russian Army.

Robert E. Gaskins, Jr., "The Voluntary Society," *The Standard,* December, 1962. Free copy available from The Standard Publishing Co., Lawrence, Kans. A young libertarian presents a proposal for extending the principle of private ownership to the court system and the police force.

William McCord, "Long Night in Ghana," *New Leader,* Nov. 26, 1962. A professor of sociology reports on the totalitarian state being erected by the *Osagyefo* ("In Accra today one sees phlanxes of 'Young Pioneers,' aged 12, chanting their oath: 'Nkrumah is always right! Nkrumah will never die!' "), and replies point by point to the Establishment's apologia for the African dictator.

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The editors of NEW INDIVIDUALIST REVIEW have recently, through their highly placed contacts in the Communist Empire, come into possession of a fantastic and hitherto secret Communist blue-print for world domination. Entitled BLUE-PRINT FOR WORLD DOMINATION, it was composed in the depths of the Kremlin in 1920, by a noted Bolshevik writer, and has been ratified and re-ratified by numerous Communist Congresses and countless Communist deeds. Every patriotic American must familiarize himself with this shocking and sobering document! Here are the Conclusions, as set forth by its author, the well-known Bolshevik leader, V. I. LENIN.

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"(1) First we will trick them into banning prayer in the public schools. Just as fluoridation of water destroys the body, so the elimination of public-school prayer destroys the spirit.

"(2) Then, in keeping with our almost Oriental immoralism, we will begin the steady introduction of pornographic materials—both those which are rankly so, and those which we will camouflage as "avant-gardism"—into American society. Pornography will be the chief weapon in our campaign to rot out the moral fibre of America, but abstract art and 12-tone music are not to be neglected in this connection.

"(3) Our final take-over will be preceded by an unparalleled crusade to destroy the magazine, NEW INDIVIDUALIST REVIEW. This quarterly journal, because it is so highly informative, entertaining and intellectual, is perhaps our single most serious problem in the United States, rivalled only by the Strategic Air Command. To destroy NEW INDIVIDUALIST REVIEW is to make America a plum ripe for the picking!"

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Society lives and acts only in individuals . . . Everyone carries a part of society on his shoulders; no one is relieved of his share of responsibility by others. And no one can find a safe way for himself if society is sweeping toward destruction. Therefore everyone, in his own interests, must thrust himself vigorously into the intellectual battle. None can stand aside with unconcern; the interests of everyone hang on the result. Whether he chooses or not, every man is drawn into the great historical struggle, the decisive battle (between freedom and slavery) into which our epoch has plunged us.

—Ludwig Von Mises

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